Establishment of Harmonized Policies for the ICT Market in the ACP Countries

Access to Submarine Cables:

Assessment Report

HIPSSA

Harmonization of ICT Policies in Sub-Saharan Africa



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Foreword

Information and communication technologies (ICTs) are shaping the process of globalisation. Recognising their potential to accelerate Africa's economic integration and thereby its greater prosperity and social transformation, Ministers responsible for Communication and Information Technologies meeting under the auspices of the African Union (AU) adopted in May 2008 a reference framework for the harmonization of telecommunications/ICT policies and regulations, an initiative that had become especially necessary with the increasingly widespread adoption of policies to liberalise this sector.

Coordination across the region is essential if the policies, legislation, and practices resulting from each country's liberalization are not to be so various as to constitute an impediment to the development of competitive regional markets.

Our project to 'Support for Harmonization of the ICT Policies in Sub-Sahara Africa' (HIPSSA) has sought to address this potential impediment by bringing together and accompanying all Sub-Saharan countries in the Group of African, Caribbean and Pacific States (ACP) as they formulate and adopt harmonized ICT policies, legislation, and regulatory frameworks. Executed by the International Telecommunication Union (ITU), co-chaired by the AU, the project has been undertaken in close cooperation with the Regional Economic Communities (RECs) and regional associations of regulators which are members of the HIPSSA Steering Committee. A global steering committee composed of the representatives of the ACP Secretariat and the Development and Cooperation – EurepeAid (DEVCO, European Commission) oversees the overall implementation of the project.

This project is taking place within the framework of the ACP Information and Telecommunication Technologies (@CP-ICT) programme and is funded under the 9th European Development Fund (EDF), which is the main instrument for providing European aid for development cooperation in the ACP States, and co-financed by the ITU. The @CP-ICT aims to support ACP governments and institutions in the harmonization of their ICT policies in the sector by providing high-quality, globally-benchmarked but locally-relevant policy advice, training and related capacity building.

All projects that bring together multiple stakeholders face the dual challenge of creating a sense of shared ownership and ensuring optimum outcomes for all parties. HIPSSA has given special consideration to this issue from the very beginning of the project in December 2008. Having agreed upon shared priorities, stakeholder working groups were set up to address them. The specific needs of the regions were then identified and likewise potentially successful regional practices, which were then benchmarked against practices and standards established elsewhere.

These detailed assessments, which reflect sub-regional and country-specific particularities, served as the basis for the model policies and legislative texts that offer the prospect of a legislative landscape for which the whole region can be proud. The project is certain to become an example to follow for the stakeholders who seek to harness the catalytic force of ICTs to accelerate economic integration and social and economic development.

I take this opportunity to thank the European Commission and ACP Secretariat for their financial contribution. I also thank the Economic Community of West African States (ECOWAS), West African Economic and Monetary Union (UEMOA), Economic Community of Central African States (ECCAS), Economic and Monetary Community of Central Africa (CEMAC), East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC), Intergovernmental Authority on Development (IGAD), Communication Regulators' Association of Southern Africa (CRASA), Telecommunication Regulators' Association of Central Africa (ARTAC), United Nations Economic Commission for Africa (UNECA), and West Africa Telecommunications Regulators' Association (WATRA), for their contribution to this work. Without political will on the part of beneficiary countries, not much would have been achieved. For that, I express my profound thanks to all the ACP governments for their political will which has made this project a resounding success.

Brahima Sanou
BDT, Director

Acknowledgements

The present document represents an achievement of a regional activity carried out under the HIPSSA project ("Support to the Harmonisation of ICT Policies in Sub-Sahara Africa") officially launched in Addis Ababa in December 2008. It is a companion document to the *ECOWAS Regulation on Condition to Access to Submarine Cables Landing Stations* and the *WATRA Guidelines on Access to Submarine Cables*[1].

In response to both the challenges and the opportunities of information and communication technologies' (ICTs) contribution to political, social, economic and environmental development, the International Telecommunication Union (ITU) and the European Commission (EC) joined forces and signed an agreement aimed at providing "Support for the Establishment of Harmonized Policies for the ICT market in the ACP", as a component of the Programme "ACP-Information and Communication Technologies (@CP-ICT)" within the framework of the 9th European Development Fund (EDF). i.e., ITU-EC-ACP Project.

This global ITU-EC-ACP Project is being implemented through three separate sub-projects customized to the specific needs of each region: Sub-Saharan Africa (HIPSSA), the Caribbean (HIPCAR), and the Pacific Island Countries (ICB4PAC).

For this particular activity of the HIPSSA project, the Sector Project "ICT for development" of the Deutsche Gesellschaft fur International Zusammenarbeit mbh (GIZ) on behalf of the German Federal Ministry of Economic Cooperation and Development (BMZ) provided technical and financial support. This GIZ collaboration is part of an on-going collaboration, which also includes other actions to the benefit of regional associations of regulators and national administrations of German development cooperation's partner countries.

In 2009 West African Telecommunication Regulators' Assembly (WATRA) identified access to submarine cables as one of the most pressing priorities of its members and initiated a consultative process to equip them with guidelines with a first workshop organised in collaboration with GIZ and HIPSSA and held in Accra, Ghana on 17-18 November 2009.

The present assessment report, the guidelines and the regulation have been prepared by Ms. Katia Barresi-Duhamel, Ms. Frédérique Dupuis-Toubol and Ms. Katarzyna Tyka of Bird & Bird on the one hand, and Mr. Russell Southwood of Balancing Act on the other hand. Additionally, Ms Aïssatou Dieng Diop of ATELCO and Ms. Saïda Ouederni of Steer provided technical advice. These experts have been guided by the Commission of the Economic Community of West African States (ECOWAS) and WATRA Secretariat which are members of the HIPSSA Steering Committee co-chaired by the African Union's Commission (AUC) and the ITU.

These draft documents have been reviewed, discussed and validated by broad consensus by participants during the workshop organised by WATRA in Monrovia, Liberia with the support of the Liberia Telecommunication Authority (LTA) on 7-9 December 2010 and the at the ECOWAS National ICT Experts' consultative meeting in Lomé, Togo on 22-25 March 2011.

The WATRA Guidelines were adopted at the 9th WATRA Annual General Assembly in Accra, Ghana on 2-3 June 2011 and the ECOWAS Regulation at the 11th Meeting of ECOWAS Ministrers of Telecommunication and ICT in Yamoussoukro, Côte d'Ivoire on 14 October 2011.

[1] WATRA Guidelines and ECOWAS Regulation, including HIPSSA implementation methodology, are available at www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/index.html

Acknowledgements

ITU would like to thank the workshop delegates from the ECOWAS information and communication technologies (ICT) and/or telecommunications ministries, WATRA members, the Commissions of the Economic Community of West African States (ECOWAS) and the *Union économique et monétaire ouest africaine* (UEMOA), academia, civil society and operators for their hard work and commitment in producing the contents of the final report. The contributions from the ECOWAS Commission and the WATRA Secretariat are gratefully acknowledged.

Without the active involvement of all of these stakeholders, it would have been impossible to produce a document such as this, reflecting the overall requirements and conditions of the ECOWAS/UEMOA region while also representing international best practice.

The activities have been implemented by Ms. Ida Jallow, responsible for the coordination of the activities in Sub-sahara Africa (HIPSSA Senior Project Coordinator), and Mr. Sandro Bazzanella, responsible for the management of the whole project covering Sub-sahara Africa, Caribbean and the Pacific (ITU-EC-ACP Project Manager) with the overall support of Ms. Hiwot Mulugeta, HIPSSA Project Assistant, and of Ms. Silvia Villar, ITU-EC-ACP Project Assistant. The work was carried out under the overall direction of Mr. Cosmas Zavazava, Chief, Project Support and Knowledge Management (PKM) Department. The document was developed under the direct supervision of the then HIPSSA Senior Project Coordinator, Mr. Jean-François Le Bihan, and has further benefited from comments of the ITU Telecommunication Development Bureau's (BDT) Regulatory and Market Environment (RME) Division. Support was provided by Ms. Margarida Evora-Sagna, ITU Area Representative for West Africa. The team at ITU's Publication Composition Service was responsible for its publication.

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List of acronyms

ARCEP	*Autorité de régulation des communications électroniques et des postes:* French regulatory authority for electronic communications and post
ART	*Autorité de régulation des telecommunications*: French regulatory authority for telecommunication, previous denomination of ARCEP
AT&T	American Telephone & Telegraph
CEE	*Communauté économique européenne:* see EEC in English
CLEC	Competitive Local Exchange Carrier
CLS	Cable Landing Station
CPCE	*Code des postes et des communications électroniques*: French post and electronic communications legal code
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EU	European Union
FCC	Federal Communication Commission
GATS	General Agreement on Trade in Services
ICTA	Information & Communication Technologies Authority of Mauritius
IDA	Infocomm Development Authority
ILEC	Incumbent Local Exchange Carrier
IPLC	International Private Leased Circuit
IRU	Indefeasible Right of Use
ISND	Integrated Service Digital Network
ITU	International Telecommunication Union
IXC	Inter-Exchange Carrier
JORF	*Journal official de la République française:* French official gazette
LATA	Local Access and Transport Area
LEC	Local Exchange Carrier
NRA	National Regulatory Authority
OJ	Official Journal: EU official gazette
ONP	Open Network Provision
PSC	Public Service Commission
PUCs	State-level Public Utility Commission
REC	Regional Economic Community
RIO	Reference Interconnection Offer
RNIS	*Réseau numérique à intégration de services* see ISDN in English

List of acronyms

Sec.	Section
SMP	Significant Market Power
TRAI	Telecom Regulatory Authority of India
U.S.C.	United States Code
UNE-L	Unbundled Network Element Leasing
UNE-P	Unbundled Network Element Platform
WATRA	West African Telecommunication Assembly
WTO	World Trade Organisation

Summary

Bandwidth is the petrol of the new global economy. Affordable international bandwidth is an essential component for any African country to remain competitive in a changing world. Access to competitively priced wholesale international bandwidth allows operators to provide cheaper Internet access to their users. More can clearly be done by countries if the cost of international bandwidth can be improved.

Integration of regional markets is essential to the growth of trade between ECOWAS countries and lowering the cost of communicating and transferring money is a key plank in that process. The goods traded are not simply luxury goods but also essential foodstuffs that make up the daily diet of all citizens. Cheap and accessible bandwidth allows access to both knowledge and opportunities that will help large numbers of West Africans increase their potential to succeed.

None of this will occur if there are barriers to affordable and equal access to the new international fibre cables coming to Africa. In 2011 there were five West African countries which had only one landing station and a number of others where all of the landing stations were controlled by a single company. Without a clear regulatory framework, there is a risk that operators use their dominant market position to impede access and retain prices at non-competitive levels. Without addressing issues of market failure of this kind, West African countries run the danger of not being able to take advantage of the benefits that the new international cables should provide. It is essential that the new submarine cables create effective competitive pressure on price and service and that access to landing stations is properly dealt with through policies that encourage investment, enabling regulation and in some cases public-private partnerships.

Whilst the principles of open access are clear, there is no toolkit, which will allow all governments and regulatory bodies in West Africa to implement a framework favourable to an open access model. Therefore this study aims to provide flexible and practical approaches that will help African Governments implement this kind of approach.

In order to offer these regulators multiple approaches and a set of proposed guidelines, the study draws upon an extensive body of legal and regulatory statutes, guidelines and general documents from Africa and across the globe. It also examines international law and regulation from bodies such as the World Trade Organisation and the European Commission. The review of these documents focuses on: authorisations and licences (terms and conditions); access (interconnection and physical access); market power and monopoly; reasonable and transparent price-setting; and implementation (timeliness and transparency).

None of the legislation or regulation examined from the sixteen ECOWAS and WATRA member states deals directly with submarine cable regulation, although there are references to international connections in a number of instances. Legislation from elsewhere on the continent deals with the concept of essential facilities.

Although there are three very different legal traditions (Anglophone, francophone and lusophone), there are remarkably similar wordings for definitions, general principles, the concept of dominant market power; and interconnection frameworks, The proposed submarine cable guidelines address terms, conditions and pricing and these are all areas covered by interconnection agreement legislation. However, these rules should be adapted to apply to the specific situation of international cables to allow for the emergence of competitive offers for international capacity.

In legislation and regulation of developed countries, there is little that is specific to access to international cables. However, as with the African material reviewed, the general rules for interconnection and access can form the basis of a regulatory intervention for submarine cables with suitable adaptation.

Summary

It is essential to deal with the main bottleneck caused by landing stations but also to allow existing operators on land connected by submarine cable to access capacity held by other suppliers: i.e. consortium members of the existing submarine cable or of a new cable wishing to connect the country.

There are several possible methods for imposing the necessary rules for the creation of an environment that would facilitate open access to submarine cables: granting approvals and the modification of the reference offers of the operators using landing stations, the introduction of specific measures in their licence, and regulation with a general reach as demonstrated by the unbundling regulation of the European Commission.

Among the practices examined, the regulations implemented by the Indian and Singapore regulators offer a complete vision for the key issues to be dealt with and are worth of attention because of the significant practical outcomes once it was implemented.

The proposed guidelines have been designed to fit within the context of wider Pan-African agreements including: the African Union Framework for Harmonisation of Telecoms and ICT Policies and Regulations in Africa; the Abuja Declaration 2010; the ECOWAS Supplementary Acts and the UEMOA Directives. On the basis of the latter two, there are key statutes and directives that either have already or can be "domesticated": in other words, passed into national law.

To provide access to international bandwidth in the WATRA context, the following issues require attention:

- Alternative service providers need to have access to the international bandwidth capacity under the same terms as the consortium members.
- Access facilitation (including to other consortium members) should not be unduly prevented or delayed by the consortium member having control over cable landing station;
- Transparent and non-discriminatory access with transparent charges at cable landing stations needs to be established;
- Co-location at landing facilities needs to be authorised;
- Responsibilities in terms of operational functioning should be well defined;
- Time limits for execution of access and collocation provision have to be defined as well as a minimum period of access and collocation.

The report makes the following recommendations:

- It is necessary to be clear on the geographic extent of the legislation, defining the wet and dry portions (see page 40);
- There are a number of tools for tackling submarine cable issues and these include: Reference Interconnection and Access Offers (see page 41); licences (see page 42); competition law (see page 42); and the separation of ownership of the cable in a Special Purpose Vehicle funded through a Public-Private Partnership (see page 43).

The proposed WATRA Guidelines are laid out in a separate document. These include: definitions of key terms; objectives and spheres of allocation; the enforcement of regulation; charges for access facilitation; collocation; backhaul services and maintenance; minimum commitment period for co-location service; service level guarantees and dispute resolution.

Based on the work conducted by WATRA members in close collaboration of representatives from ECOWAS member states' ministries in charge of telecommunication and ICT, the ECOWAS Commission prepared a Regulation which was subsequently adopted by ECOWAS ICT Ministers at their 11th meeting in Yamoussoukro, Côte d'Ivoire on 14 October 2011. This legal instrument will be enforceable in all ECOWAS Member Sates once endorsed by the ECOWAS Council of Ministers to be held in June 2012.

Introduction

African countries must have access to affordable international bandwidth if they are to be competitive in global markets. Creating equal access to international submarine cables at a reasonable price depends on investment and a regulatory landscape that harmonises policies and frameworks. Key West African stakeholders acknowledge that an open-access approach to international submarine cables is likely to be the best way of achieving affordable international bandwidth.[2] However, while the principles of open access are clear, there has not been a toolkit that West African governments and regulatory bodies could use to implement the harmonised policies and frameworks favourable to such an approach. This report addresses this by presenting a draft set of guidelines that define a common basis for regulatory principles.

The ECOWAS Regulation, with the underlying WATRA Guidelines as an intermediary result, is the culmination of three years' work that began with a workshop in Accra, Ghana, from 17 to 18 November 2009. The workshop was organised by WATRA and GIZ with HIPSSA actively participating in setting the agenda and contributing to discussions. A report by Balancing Act, an African telecommunications consultancy, *International Bandwidth: Tackling Blockages to Access*, was commissioned for the workshop. It identified three key recommendations:

- Equal access to international bandwidth;
- An increase in the amount of international bandwidth capacity;
- A significant reduction in the cost of international communications.

Based on the outputs from this workshop, HIPSSA initiated a detailed assessment of regulatory policies and frameworks relating to submarine cables to inform the development of the West African policy and regulatory guidelines. A team of experts was recruited by HIPSSA, in close collaboration with WATRA and GIZ, to carry out the assessment and produce the subsequent guidelines. Mr Russell Southwood, from Balancing Act, was responsible for policy-related aspects while Ms. Katia Barresi-Duhamel of Bird & Bird addressed the legal aspects. Technical advice was provided by Ms. Aïssatou Dieng Diop of ATELCO and Ms. Saïda Ouederni of Steer.

The assessment began with an examination of the regulatory policies and frameworks in effect in WATRA countries so that existing West African best practices could be identified. These were compared with the best practices of other African countries before those in Europe, the United States, Asia and the Indian Ocean were analysed. The assessment, including examples of best practices from across the globe, forms Part One of this report.

The WATRA Guidelines and subsequent ECOWAS Regulation were developed on a common basis of regulatory principles, based on the assessment's findings, which are laid out in Part 2 of this report. The assessment report and its recommendations were discussed and reviewed at a WATRA workshop for key stakeholders organised with the support of the Liberia Telecommunication Authority (LTA) in Monrovia, Liberia, from 7 to 9 December 2010 and at the ECOWAS National ICT Experts' consultative meeting in Lomé, Togo on 22-25 March 2011. Most importantly, before being validated, the guidelines were evaluated by the stakeholders to ensure they met the objectives identified in the 2009 workshop in Ghana. The implementation of these guidelines, together with appropriate regional investment policies, would ensure ECOWAS and WATRA countries have equal access at a reasonable cost to submarine cables.

[2] Cf. article by Mike Jensen : "Abaisser les coûts de la bande passante internationale en Afrique" Série APC "Thèmes émergeants" 2006.

Integrated markets have social as well as economic benefits. Cheap and accessible bandwidth enables access to both the knowledge and opportunities that will help large numbers of West Africans increase their potential to succeed. Being informed about African and worldwide developments will enable Africans, from school children, students and academics to doctors and nurses, to influence progress in their countries.

In 2011 there were five West African countries with only one landing station and a number of others where the landing stations were controlled by a single company. This is of particular relevance to landlocked West African countries, which depend upon international bandwidth to connect to the landing station. The implementation of WATRA Guidelines and ECOWAS Regulation will avoid operators being able to use their dominant market position to impede access and retain prices at non-competitive levels. A clear regulatory framework will enable all West African countries to take equal advantage of the benefits that the new international cables could provide. Harmonised policies and legislation can encourage investment, enable regulation and, where appropriate, result in beneficial public-private partnerships.

Part 1

Analysis of existing regulatory frameworks and practices in terms of access to submarine cables

Part 1

1 Adopted approach

1.1 General methodology

In order to create common regulatory principles for WATRA members, this study was carried out in two stages.

The first stage is an analysis of the existing regulatory frameworks for access and, where applicable, for specific access to submarine cables. This first stage had two steps:

- The first step analyses the regulation in WATRA member countries and, where relevant, in other countries in Africa in order to provide the draft guidelines with a consensual basis rooted in existing legal and regulatory practice;
- The second step analyses the relevant international body of regulation and puts it into perspective with the history and evolution of the implementation of the principle of Open Access in the countries that opened up the telecommunications sector at the beginning of the 1990's and for others, like the United States, at an even earlier date.

On the basis of the comparison and evaluation of the regulations and practice listed in the two areas above, the second phase of the study developed recommendations, listing the relevant regulatory objectives, conditions and principles in terms of efficiency and implementation, to allow the WATRA member countries to create a regulatory environment favourable to equal access to the capacities of submarine cables, at a reasonable cost, in West Africa (cf. Part 2 infra).

1.2 Reading the matrix

During the first phase and in order to compare the regulatory texts and practices analysed, the authors of the study have developed a common matrix of legal and regulatory texts relevant to the guidelines.

Country by country or region by region across the globe, this matrix cites and/or describes the relevant legislative and regulatory references in terms of access and, where applicable, in terms of specific access to broadband capacities of submarine cables.

The countries or regions concerned are located on the left of the matrix (cf. Annexes 2 and 4) and the sections dealt with are located at the top: the different headings indicate the fields of regulation concerned. These fields cover the following subjects:

1.2.1 Authorisations and licenses: Terms and conditions

The various themes dealt with in this section attempt to identify the potential restrictions to and/or incentives for access originating from authorisation conditions and/or licenses accorded to operators or foreseen, where applicable, in the specifications accompanying these licenses. These themes are as follows: the conditions of the licensing and authorisation regime; the potential restrictions that such authorisations would add to the access to or the sharing of network infrastructure; whether or not they are technologically neutral (thus do not create artificial barriers based on technology);the conditions applicable to cross border players; and finally the conditions for granting rights of way on the public (or private where applicable) domain.

1.2.2 Access: Interconnection and physical access

This section deals with conditions of access in the wider sense: the conditions for interconnection and access to physical and/or logical aspects of the networks. These have been and are still, essential for the liberalisation of the telecommunications market and, indirectly, for the development of fair competition

on this market. This section thus deals with the regulations and practices implemented under the various aspects which are: physical access to elements of the network (i.e.: unbundling), co-localisation and sharing of physical infrastructure, interconnection, access to specific logical resources where applicable (Information Systems, service platforms etc.), again where applicable the condition of maintenance and quality for wholesale services thus provided.

1.2.3 Market power and monopoly

This section deals with the rules implemented to compensate for the situation of monopoly or of significant market power held by one player in a given telecommunications market. In this context, the following points are examined: the objectives of the intervention of the regulator; the way in which significant market power is defined; and the means of remedying the situation in terms of tariff or non-tariff obligations, including requirements for transparency, non discrimination, differentiation between wholesale and retail activities and separation of accounts in order to obtain a certain degree of transparency in the internal sale prices of operators.

1.2.4 Reasonable and transparent price setting

Practices in Africa and elsewhere differ in this area so the emphasis within the different parts of the matrix reflects these differences. In Europe, in particular, the monitoring of wholesale tariffs changed from a preliminary control by authorisation of the offers of interconnection and access references before their publication, to monitoring carried out *ex post* by the regulator during litigation proceedings between operators or by the full jurisdiction of the regulator.

In Africa, on the other hand, the regulatory frameworks in place most often provide for *ex ante* monitoring of these prices by preliminary approval of the interconnection catalogue and access offers from the dominating operator. Therefore the African part of the matrix examines the rules which would facilitate a practice that is (i) non-discriminatory, (ii) transparent and would lead to (iii) cost oriented wholesale prices. The reference offers and interconnection and access catalogues provides references and examples of their implementation.

The international matrix includes them in the "*Market power and monopoly"* section but differentiates between the tariff and non-tariff obligations put in place to remedy the control of one or several players in the market having Significant Market Power.

1.2.5 Implementation: Timeliness and transparency

The purpose of this section is to identify the regulatory or litigation proceedings which ensure the active and transparent implementation of the regulatory frameworks examined. The section therefore deals with the proceedings for dispute settlement and disciplinary measures, rights of appeal, the sector consultation procedures put in place and the time limits within processes.

1.3 Scope and sources of the assessment study

1.3.1 Analysis of regulatory framework on a regional level (West Africa and other African comparators)

This part of the analysis provides the narrative description of two much more detailed documents:

- a country-by-country matrix that looks at the relevant legal and regulatory material in categories that are relevant to submarine cable guidelines;
- a country-by-country breakdown of relevant excerpts from acts, decrees, regulatory licences, interconnection catalogues and regulatory decisions.

Both of these documents cover all sixteen WATRA member states, comparator material from three other African countries (Kenya, Mauritius and South Africa) and NEPAD (the Kigali Protocol).

The material presented in these two documents gathers together the kind of principles and wording that might be used to write a set of model guidelines. It looks at where existing legislation and regulation coincides between different countries and where it differs.

It starts with the wording of definitions and principles and outlines descriptions of market operations and interconnection licence agreements. It then moves into more detailed areas like physical access, monopoly market power and pricing before concluding with the appeals processes available when operators disagree.

At the heart of much of the material that has been captured is the framework for interconnection agreements as connecting to submarine cables is one particular category of interconnection. Therefore much of the wording used in these kinds of agreements (particularly interconnection catalogues and Reference Interconnect Offers) have a particular relevance to the proposed guidelines. Indeed, many of the physical access, service and maintenance issues would be almost identical.

The documents used have been downloaded from the websites of regulators: all except one member state of WATRA have websites with these documents available. The work has focused on publicly available documents as this is a useful test of transparency of approach by the regulators themselves. A potential new entrant to a country should be able to get all of the relevant documents that govern the regulatory environment without difficulty.

However, there are other documents (for example, specific licences for international cable operators) which exist but are not publicly available. Therefore the purpose of the guidelines is to make clear publicly the terms and conditions under which submarine cables will be regulated in West Africa and to seek the maximum degree of harmonisation between different countries.

1.3.2 Analysis of regulatory framework on an international level

On an international level, the authors of the study have analysed the legislation and regulation applicable to interconnection and access as well as to the terms for granting of authorisations and/or licenses implemented since the beginning of the liberalisation and up to the present day in Europe, the United States and in certain cases India, Singapore and Mauritius.

In this respect, they essentially studied:

- on an international level:
  - WTO measures pertaining to the telecommunications sector,
  - Various doctrinal texts and publications of the ITU and other institutions.
- Europe:
  - the first ONP European directives;
  - the amendment of these directives in 2002 by the “Telecoms Package” directives;
  - the adjustments made to the “telecoms package” through the amendment of the regulatory framework of November 2009;
  - certain application measures concerning the regime for licenses and submarine cables in France,
  - the law for the Overseas Economic Development Law (LODEOM) of 27 May 2009 (France);
  - ARCEP litigation proceedings concerning access to SAT » capacities between Reunion Island and Metropolitan France and a ruling from the Competition authority on the same subject

- The United States:
  - the Shermann Act of 2 July 1890;
  - the « *Telecommunication Act* » of 1996 and different application rulings made by the FFC;
  - the « *Cable Landing Licence Act* » and its application text;
  - an example of a license granted based on the aforementioned texts;
  - the main Court rulings on essential infrastructure.
- India:
  - rulings and recommendations of the Indian regulatory body (*Telecom Regulatory of India, TRAI*) pertaining to access to landing stations and to circuits rented on submarine cables.
- Singapore:
  - ruling by the Singapore regulatory authority (*Infocomm Development Authority, IDA*) which modified Singtel's reference offer to introduce specific measures pertaining to landing stations;
  - the relevant reference offer;
- Mauritius:
  - ruling by the Mauritian authority (*Information & Communication Technologies Authority, ICTA)* on the tariffs for the international leased circuits of the historical operator, Mauritius Telecom.

All the documents used are available online and are included in the bibliography *infra.* The relevant measures resulting from these documents are described in the matrix shown in Appendix 2 of the study.

Part 1

2 Analysis of regional regulatory framework

2.1 What the matrix shows for WATRA member states

None of the legislation or regulation examined from the 15 WATRA member states deals directly with submarine cable regulation, although there are references to international connections in a number of cases. Indeed, in the example Ghana there is a specific clause covering cross-border licences.

Although three very different legal traditions are represented amongst the WATRA member states (Anglophone, francophone and lusophone) there are remarkably similar wordings for definitions, general principles and interconnection frameworks.

Almost all countries define themselves as working with competition ("*saine et loyale*" or healthy and fair in English) and that they are against the following: restrictive practices, abuse of dominant position, anti-competitive practices, distortion of competition, transparency, undue discrimination , distortion of competition and undue preference. Expressed positively, they are explicitly in favour of: transparency, neutrality, equal treatment, equal network access and non-discrimination. Whilst there may be many nuances in interpretation and actual practice, these terms are common to all of the legal and regulatory documents examined.

Three examples demonstrate the similarities and the nuanced differences. Cape Verde's regulator states as an objective: "*Assegurar an inexistencia de distorcoes ou entraves a concorrencia*." (Ensure there are no distortions or barriers to competition.) Togo's regulator says that interconnection will be "*…dans des conditions objectives, transparent et non-discriminatoires.*" (Under conditions that are objective, transparent and non-discriminatory.) Nigeria's regulator specifies that there must be no anti-competitive conduct for *"…the purpose or effect of promoting or substantially limiting, restricting or distorting competition*."

Sometimes these over-arching principles are applied generally, whereas in other instances they are applied specifically to interconnection issues. Liberia's regulator says there will be a principle of equal network access. Nigeria's regulator says that interconnection will be made within the principles of neutrality, non-discrimination and equality of access. And as above, Togo has similar principles applied to interconnection.

Just under half of the countries have documents that specifically cover the general promotion or encouragement of sharing infrastructure. In the context of submarine cables, the encouragement of sharing infrastructure is another general principle that can then be translated into a more specific guideline. For example, the Burkinabe, Malian and Liberia regulators have sections of their legislation that covers this topic.

Far fewer countries have documents that cover the translation of general principles into detailed (publicly available) practical frameworks for interconnection. Examples include Mauritania (with detailed "*catalogues d'interconnexion"* or Reference Interconnection Offer for each operator); Nigeria (with detailed licence specifications covering these topics); and Senegal (which references the need for reasonable charging for co-location services). On collocation, Gambia's documents specify an obligation to provide points of interconnection and collocation and Nigeria's documents also allow for remote and virtual collocation, both of which will be relevant for land-locked countries seeking landing station collocation.

In event of there being a monopoly operator of a landing station, legislative and regulatory frameworks cover dominant market power and abuse of dominant position may be relevant. Documents from half of the countries analysed had specific clauses or articles dealing with this issue. Dominant position is defined

differently by different countries: Niger's documents specify 30% or more market share whereas Senegal and Mauritania specify 25% or more market share.

In the case of Nigeria, a recent investigation of significant market power found one operator with a 40% market share. It took no action on two grounds, one of which is relevant to this paper: firstly, because competition was increasing and the operator with the largest market share was losing ground; secondly, in the case of international cables, four new cable operators will be arriving.

However, the regulator NCC made a general point that is also relevant to this work: The NCC's "telecommunications regulatory framework provides specific remedies to deal with substantiated cases of anti-competitive conduct. In most cases, these remedies can be implemented without a finding of dominance."

Separation of an operator's wholesale function (which can be done in a number of different ways) allows the cost of its operations to be seen more transparently and makes it harder to use cross-subsidies. Only three countries seem to have tackled these issues. Burkina Faso's documents have an article that specifies how functional separation might be instigated. Ghana has actually insisted on functional separation in Vodafone Ghana. And Nigeria has detailed clauses in the relevant licences specifying separate accounts and forbidding cross-subsidy. In addition, it has a clause in one document covering agents and resellers which does not appear in any of the other documents but may become relevant as a resellers' market emerges in international fibre.

The definition of network assets like landing stations as "essential facilities" has been the foundation for addressing monopoly landing stations in several jurisdictions but it is an Anglophone legal concept. Only Ghana's documents have a reference to it:"…a network or other essential facility."

Legislation can specify pricing approaches and grant authority to approve pricing. Gambia's documents specify the use of cost-oriented pricing and Nigeria's documents allow the NCC to approve tariff plans:» Methods adopted for tariffs must ensure Prohibition of Undue Preference and absence of Undue Discrimination."

Seven countries specify some form of costing methodology for interconnect prices, with Ghana and Togo's documents insisting on cost-based pricing, whilst Nigeria's document wording "encourages" it. Other regulators have detailed pricing methodologies included in their documents. Ghana and Nigeria specify that the operator must supply information to the regulator and the former can change prices if they go against the Act or are "inconsistent with best operation of a public network." Niger specifies that its incumbent cannot refuse to negotiate with an operator because there is an already existing offer in its "*catalogue d'interconnexion*". Mali's documents specify that the "*operateur puissant*" must furnish a Reference Interconnect Offer.

All countries have some form of dispute resolution processes but a smaller number of countries (including Gambia, Ghana, Mauritania and Nigeria) have detailed processes related to interconnection disputes.

2.2 What the matrix shows for Comparator examples and these compare with WATRA legal and regulatory frameworks

The comparator countries all have general statements governing principles and the obligation to interconnect. Kenya's Article 11 (1) of the Information and Communications (Fair Competition and Equality of Treatment) 2010 specifies: "*All licensees shall provide uniform, non-preferential service on a first-come-first-served basis to all persons within a covered geographical area or a given class who request such a service. Article 4 of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010:"An interconnection licensee shall accept all reasonable requests for access to its telecommunications system at network termination points offered to the majority of its interconnecting operators*."

NEPAD's Kigali Protocol states a number of high-level objectives in terms of rolling out a continental broadband network and article 2 creates a general undertaking on the parties to "refrain from any unilateral and/or collective action that may hinder the attainment of the objectives in this protocol."

Article 8 of South Africa's Electronic Communication Act 2005 states: "*the public interest in ensuring service interoperability, non-discrimination and open access interconnection and facilities leasing*." It also specifies the regulation and controlling of anti-competitive practices. Chapter 7 of the same Act provides a detailed statement of the Obligation to Interconnect with an outline of underlying principles.

In terms of physical access, Article 14 of the Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010 deals with Points of Interconnection. Article 18 deals with network access and Article 19 with collocation. Article 10 is a rare reference to Quality of Service, something that is probably sufficiently important to operators that it needs a reference. Article 16 of NEPAD's Kigali Protocol covers Access to Undersea and Terrestrial Broadband and Fibre Optic Cable Systems

In terms of dealing with monopoly operators and dominant market power, Kenya's Articles 8 and 9 of the Information and Communications (Fair Competition and Equality of Treatment) 2010 specifies deal with dominant market power and how it will be addressed. In a similar way, Mauritius' ICT Act 2001 also deals with dominant market power.

Article 67 of South Africa's Electronic Communications Act 2005 provides a definition for Essential Facility which might prove useful if this term is useful in terms of the proposed WATRA guidelines. Chapter 8 Electronic Communications Facilities Leases specifically outlaws exclusivity agreements and restrictive practices.

There are far fewer references to pricing approaches and transparency of pricing. Article 15 of NEPAD's Kigali Protocol covers the Principle for Determination of Wholesale Charges. And Article 41 of South Africa's Electronic Communications Act outlines Interconnection Pricing Principles

Only article 22 of Kenya's Information and Communications (Fair Competition and Equality of Treatment) 2010, deals specifically with dispute resolution.

As might be expected, the comparator pieces of legislation examined cover much of the same ground as those of the WATRA member states. However, there are is a greater level of practical, operational detail in all three of the country laws.

The most striking additions not found in the WATRA member states' documents are: an insistence on Quality of Service; the use of Essential Facility as a defining term (targeted at submarine cable landing stations); the outlawing of exclusive agreements (again targeted at submarine cable landing stations); and the use of the term Open Access.

Part 1

3 Analysis of international regulatory framework

3.1 Main findings of the analysis of international texts and practices

3.1.1 General framework for open access to telecommunications networks

3.1.1.1 Emergence and implementation of the concept of Open Access

The Annex on telecommunications in the General agreement on trade in services (GATS) provides that: "*Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule*."

The principles of Open Access were developed in parallel by the Open Network Provision directives (ONP) of the European Commission. It developed the principles applicable to technical and tariff conditions for access and interconnection over time: the key principles are transparency, equal access and non discrimination.[3]

In terms of tariffs, the first ONP directive[4] laid the framework of reference for principles of harmonised tariffs for the provision of open networks. "*Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair sharing in the global cost of the resources used and the need for a reasonable level of return on investment. Thus the tariffs must be based on objective criteria and must in principle be cost-oriented. They must be transparent and properly published. Tariffs must be non-discriminatory and guarantee equality of treatment (…).*"

From the 1st January 1998, the date set by the European Commission for the complete liberalisation of the sector, specific obligations were made imposable to dominant operators identified in Annex 1 of the 97/33/CE Directive of 30 June 1997[5].

A statement by the Commission about the application of the competition rules to the access agreements in the telecommunications sector listed the principles applicable to access which stem from Competition Law and legislation pertaining to the sector, particularly the relationship between the competition rules and the Open Access legislation of the sector , and adopted the following definition for essential infrastructure: «*facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means* » as well as their fundamental role and the means which national competition authorities could use to sanction and put an end to refusal to grant access to these essential resources or to the application of unfair or unfavourable conditions of access.

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3 Directive 90/387/CEE of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision (ONP).

4 Ibid.

5 Directive 97/33/CE of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP).

3.1.1.2 Access in the current European regulatory framework

The revision of the regulatory framework in 2002 re-evaluated all the previous texts by simplifying them and adding some major changes to the applicable principles and rules, in particular, this list not being exhaustive:

- the general authorisation regime became the rule whereas the preliminary authorisation regime called the license regime could no longer be applied, except to operators using rare resources such as spectrum;
- the principle of technological neutrality was mentioned, however its application was not made mandatory in all cases;
- the idea of enduring bottleneck conveyed by the concept of essential infrastructure was replaced by a more dynamic and progressive concept of sector regulation (ex ante), seen as a necessary but temporary transition towards a fully liberalised market over which the rules of the common law of competition (ex post) would suffice for its fair functioning.

Consequently, the regulation of the sector should in theory be reduced with the growth in progress of liberalisation. The process of analysis of the market introduced by the directives of the Telecoms Package in 2002 was precisely undertaken to decide, market by market, (goods and services that are non-substitutable as regards supply and demand) whether or not there was a need to maintain the regulation of the markets analysed.

This procedure includes 3 steps for each market:

1. Analysis of a particular market segment to determine whether it is sufficiently competitive. In case of insufficient competition, the national regulation authority (NRA) shall prove that the market concerned fulfils the following three (3) criteria:
   - existence of elevated and non-transitory barriers to entry, whether of a structural, legal or regulatory nature,
   - a market structure which does not tend towards effective competition,
   - inability of competition law to solely adequately address the market failures concerned.

   If the market meets the three criteria, it is considered as a relevant market which means it can be regulated. Currently in the European Union, only wholesale markets (interconnection, access etc.) are destined to be regulated. Retail markets are not regulated except for universal service (affordability of tariffs) or on the grounds of the creation of the internal market (i.e. Regulation EC No. 717/2007 on roaming on public mobile networks within the Community)
2. The NRA, then identifies the operators known to hold significant power over these markets, in other words the operator which, taken individually or together with others, is in a position that is dominant and allows it to act in a manner that is independent vis-à-vis its competitors, clients and consumers
3. The NRA then determines solutions by imposing on these operators certain obligations, for a limited period (generally 3 years). At the end of this period, the market is re-analysed to decide whether the regulation implemented should be maintained, reinforced or removed in light of the evolution of competition on the market.

Moreover, the requirements for access, previously specified for unbundling in the Unbundling Regulation of 2000[6], reappear in the Telecom Package Directives of 2002 and are extended to other forms of physical

[6] EC Regulation N° 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop.

sharing, particularly in terms of co-localisation[7]. These requirements for access are applicable to operators considered as holders of significant market power on the access market following the analysis of the market described above.

The NRA can also oblige the SMP operator "to provide access to operational support systems or similar software systems necessary to ensure fair competition in the provision of services "[8] or to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks ".[9]

The conditions for quality of service and maintenance of access services must appear in the access reference offer that the SMP operator is required to publish.

Generally, co-localisation and sharing of other physical resources are encouraged by the NRA where a company providing electronic communications networks benefits from rights of way on the public or private sector, or from servitude[10].

Apart from the power held by the operators concerned, and once a complete consultation procedure is organised beforehand, the sharing of infrastructures can be made obligatory in the following cases:

- protection of the environment, public health or public safety,
- objectives of urbanism or sustainable development.

It aims, among other things, at the physical co-localisation and sharing of ducts, buildings, masts, antennas or antenna networks.

The Access Directive of 2002 also specifies the requirements that could be imposed upon a SMP operator in terms of:

- controlling of tariffs for interconnection and access services: cost orientation (Art.13§1),
- accountability for costs, showing at least the main categories within which the costs are regrouped (Art.13§4);
- transparency of terms and conditions relevant to access and interconnection as well as their pricing. To this end, the operator must make public clearly outlined information, such as accounting information, technical specifications, network characteristics, (Art. 9§1) and must also publish a reference offer (Art. 9§2);
- respect of the principle of non discrimination, in other words, the requirement to provide third party operators with wholesale services upon request (interconnection access etc.) necessary for the development of their retail services and the information necessary for their implementation under the same conditions and with the same quality of service as the SMP operator provides for its own services, subsidiaries or partners (Art.10);
- accounting separation; particularly where the SMP operator is vertically integrated, it may be required to make its wholesale and internal transfer prices transparent among other things, to ensure that the requirement of non-discrimination is respected. (Art.11)

In 2009, the Directive amending the "framework", "access" and "authorisation" directives introduced a new article 13bis which allows regulators, as a last recourse and after having submitted this proposition to

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7 Articles. 12§1a) and 12§1f) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of electronic communications networks and associated facilities(Access Directive).

8 Art. 12§1h of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive).

9 Art. 12§1g: Ibid.

10 Art. 12 § 1 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework directive)

the Commission, to impose upon the dominant operator that is vertically integrated, the obligation to transfer its activities of supplying wholesale services to a functionally independent economic entity. This is only possible in the cases where traditional solutions have not permitted effective competition and where major competition problems or market failures persist. The separate entity supplies products and access services to all the companies, including its own company, within the same deadline and according to the same pricing conditions, with the same level of service, and with the help of the same systems and procedures that it itself uses.

It must be noted that this functional model of separation was implemented before the revision of the regulatory framework of communications networks in 2009, by a small number of countries including those of the United Kingdom but on the grounds of Competition Law[11].

3.1.1.3 Access in the United States: example of unbundling

In the 1980s unbundling became the cornerstone of the regulatory framework instituted by the *Federal Communication Commission* (FCC) for the development of competition on a local level in order to establish principles for Open Network Architecture (ONA).

These requirements for unbundling were specified by the FCC through the implementation of an impairment test in order to evaluate which parts of the network must be unbundled. This test consists in finely dissecting the parts of the network and applying to them the idea of essential infrastructure[12]. The FCC also developed a method of accounting for costs based on a "bottom up" model called TELRIC (pour *Total Element Run Incremental Cost*) to steer prices for unbundled services towards the costs of an efficient operator. At the end of these analyses, the FCC obliged local operators holding a monopoly over the local loop to make 7 parts of the network available to third party operators: the local loop, network interface devices (JNV), local commutation, interservices transmission installations, signalling networks and call databases, operation support systems (OSS), operational services (OS) and directory assistance (DA).

Within this context, local operators had to offer.

- unbundled network elements- leasing (UNE-L) and,
- offers practically resold wholesale, for example the UNE-P (unbundled Network Element Platform) offer, which allows new entrants to enter the market of local telephony with practically no investment in infrastructure, by leasing existing local ILEC infrastructure at regulated prices including particularly the local loop in copper, resources on telephone exchanges and transmission lines.

However, the rules the FCC wanted to implement were met by court rulings which forced it to restrict the reach of the requirements of unbundling and to increase the tariffs operators could charge. In 2003, the FCC removed all obligations for unbundling on the residential broadband market.

In a way, the revision of the American rules for access to the local loop represented a victory for a dynamic vision of competition in which, the weight of the incentives for investment leans progressively towards state regulation dealing with enduring bottlenecks.

Finally the TRINKO case[13] provided two legal precedents. On the one hand, it restricted the possibility of imposing access to essential infrastructure only to those situations where this access is strictly impossible

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11 Cf. «Trends in Telecommunication Reform 2008: Six Degrees of Sharing. Summary » International Telecommunication Union, 9th edition, 2008, page 25

12 In reality, the impairment test, based on the doctrine of « necessary and impair standards », comes from an economic theory which is much more complex, but the metaphor used below, although simplified, does not betray the concept of the method employed by the FCC.

13 Ruling of the US Supreme Court: Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 2004.

but not in scenarios where high prices were being charged for access. On the other hand, it allowed for the idea of essential facilities being no longer applicable once the market concerned is subject to sector regulation which allows the regulator to oblige the players concerned to supply this access under fixed conditions.

3.1.1.4 The impact of authorisation conditions (licences) on network access

In Europe, operator prior authorisations[14] did not really create restrictions on access or sharing of the infrastructures used. This is still the case since the regime was removed and replaced with the general authorisation regime for fixed operators.

Things are slightly different in the United States where the provision of international communications services remains subject to the obtaining of previous authorisation called "International Section 214 Authorisation" or "International 214 Licence"[15].

Moreover and more closely linked to the subject of our study, the American Law provides for a special licence regime for the establishment and operation of an undersea or on-land cable landing station.

These licences (i.e.: *Cable Landing Licence*) include restrictions in terms of foreign ownership of the aforementioned stations (from the beach joint to the landing station). Moreover, the following must obtain a landing license:

- the company owning and operating the station and,
- any company holding over 5% of the capital of the consortium of submarine cables and using the beach joints on American territory.

These licences can be subject, « *in the interest of the public* » to specific conditions stemming from the sector regulation of telecommunications.

However licences of this kind that we were able to consult did not provide for any specific obligation of this kind but merely reserved the right for the FCC to later impose such obligations, for example:

"*Pursuant to Section 2 of the Cable Landing License Act, 47 U.S.C. § 35; Executive Order No. 10,530, as amended; and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, the Commission reserves the right to impose common carrier regulation or other regulation consistent with the Cable Landing License Act on the operations of the cable system if it finds that the public interest so requires,"*[16].

3.1.2 The rules and practices applied for access to international capacities on submarine cables

In practice, neither the USA, nor Europe faced a shortage of international fibre capacity, whereas Africa had until recently only two international cables. Therefore the USA and Europe profited from the excess of international fibre cable laid during the internet investment bubble and the greatly capacities that became possible[17]. Considerable excess capacity ensured both more than enough capacity and reasonable prices.

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[14] As a reminder, with the exception of the operators using rare resources such as spectrum, the previous authorisations or licence regime is no longer applicable in Europe for other network and/or electronic communication services operators.

[15] Report and Order In the Matters of Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996

[16] CABLE LANDING LICENSE, adopted: July 8, 1999; released: July 9, 1999: Joint Application for a License to Land and operate a Submarine Cable Network between the United States and Japan, File No. SCL-LIC-19981117-00025

[17] Cf. previously cited article by Mike Jensen: «Lowering the cost of bandwidth in Africa » APC Series 2006

Consequently, except for reasons of protectionism or national security (see the specific regime for landing station licences in the United States), access to submarine cables are rarely subject to specific rules in Western regulatory frameworks.

Nonetheless, regulation of interconnection and access in these countries provides suitable basis for regulation of access to submarine cable capacities, a minima, regarding landing stations, where applicable, concerning the leased lines or IRU supplied by authorised operators on their excess international capacities. However, in Europe there are few regulatory texts or rulings by regulators specifically dealing with access to international fibre cables.

Within this context, the French regulator ARCEP is an exception. In 1997, it published guidelines for the conditions of access to submarine cables, and some years later, issued a ruling in the context of litigation in this field. The French competition authority also gave a ruling on the same case.

In Asia and in the Indian Ocean, the regulatory authorities of some countries also used the powers held in sector regulation to create specific rules for access to international capacities at a reasonable cost.

In addition, besides sector regulation and common competition law, there is a third method of encouraging and/or preventing operators from offering access to international capacities at a reasonable cost.

This method involves including specific measures in the specifications of their licences. In Europe, the general authorisation regime offers few possibilities (except in the case of mobile operators' specifications). On the other hand in Africa, with the granting of fixed operator licences this still remains a possibility.

Finally, some mechanisms of tax exemption implemented in France's overseas territories could be applied[18].

3.1.2.1 The combined action of the sector regulator and the competition authority to lower prices on international capacities: the SAFE example

In 2002, Reunion Island was linked to Metropolitan France by the Sat3/WASC/SAFE cable. The historical operator, France Telecom/Orange holds exclusive rights for the commercialization of SAFE capacities on Reunion Island (for 5 years) and, it is the operator which owns and operates the only cable landing station on the island.

In this context, the price of leased lines provided to third party operators was initially extremely high: 16,000€/Mbit per month for a leased line. The development of Internet and all other services relying on affordable international bandwidth on Reunion suffered as a result. Arguments were made that improving this situation would accelerate the development of the island. Unfavourable comparisons were made between the price, quality and range of services offered in the island and those in Metropolitan France.

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[18] Cf. Law No. 2009-594 of 27th of May 2010 for economic development of overseas departments and territories which introduced new provisions into the French tax code related to the tax exemption of a significant part of investments made in order to connect an overseas territory by submarine cable. Pursuant to this provisions and taking into account the ARCEP's decision, the tax exemption's request department may take into account the conditions of openness and access to capabilities that will be available on future submarine cable in order to give the approval for requesting tax exemption: « *c) A l'occasion de la demande d'agrément mentionnée au a, la société exploitante est tenue d'indiquer à l'administration fiscale les conditions techniques et financières dans lesquelles les opérateurs de communications électroniques déclarés auprès de l'Autorité de régulation des communications électroniques et des postes peuvent, sur leur demande, accéder aux capacités offertes par le câble sous-marin, au départ de la collectivité desservie ou vers cette collectivité. Le caractère équitable de ces conditions et leur évolution sont appréciés par l'Autorité de régulation des communications électroniques et des postes dans les formes et dans les conditions prévues à l'article L. 36-8 du code des postes et des communications électroniques (Article 119 undecies B du Code général des impôts).* »

In January 2004, France Telecom's competitors (Outremer Telecom and Mobius) submitted a complaint to ARCEP as part of litigation proceedings. They established a price model showing that cost oriented prices for a leased line on SAFE should be around 1500 Euros/ month and per Mbit.

In May 2004, ARCEP made a decision based on this model, whilst its own price model showed lower tariffs: 547 Euros/ month and per Mbit in 2004 for leased lines on the Sat3/WASC/SAFE cable between Reunion Island and Portugal, and of 887 Euros if the leasing service to Reunion Island and transport from Portugal to Paris is included. Due to this pressure from France Telecom's competitors, ARCEP imposed a base of 1550€ per month per Mbit on the company[19].

This decision was based on the application of the qualification of the services of interconnection and access to services claimed by the competitors of France Telecom: Indefeasible Rights of Use (IRU) capacity on SAFE, backhaul connections from cable inlets, leased lines, ATM data transmission services and IP transit.

Yet, taking into account the position of France Telecom on this segment and of the fact that these services are essential for alternative operators, the services provided must be cost oriented and the burden of proof falls on France Telecom to show this is the case.

Concerning the IRU capacities held by France Telecom on submarine cables SAT3/WASC/SAFE and SEA-ME-WE, ARCEP analysed the matter as a request for access under the meaning of the provisions of the Code of Posts and Telecommunications and of the 2002/19/EC Access Directive.

However, considering that the offer for leased lines and transport and the supply of IRU was substitutable for Outremer Télécom and that this company had not provided sufficient proof that these two services provided in a cumulative and simultaneous manner were necessary to it, ARCEP did not order France Telecom to provide its IRU on its available international capacity.

Despite the decision of the Regulator which was favourable to its competitors, France Telecom refused to apply the ruling, maintained wholesale offers of a lower quality for third party operators, and developed anti-competitive practices on the retail market.

Within this context, the Competition Council (later called the Competition Authority) was called upon to rule on the practices of France Telecom in the overseas department and, in 2009, it ruled that France Telecom had abuse of its dominant position based on these practices.

During the inquiry, the Competition Council established that the other members of the SAFE consortium were authorised to supply international capacities to competing operators of France Telecom. Because of this competition, the current prices have now reached almost 100 Euros/month per Mbit.

The doctrine of "essential facility", derived from antitrust or competition law in the United States of America[20] supported both the analysis of the ARCEP and of the Competition Council but it was only addressed in outline.

The essential facilities doctrine is very important for the application of competition law. It is also likely to be important to justify more traditional telecommunications regulatory approaches. However, it is important to understand that, even for certain countries in Africa where the prospect of obtaining access to more than one undersea cable is unlikely, the test of being "essential" is not easily passed. Nonetheless, it may be a useful justification.

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19 ARCEP Decisions ° 04-375 and n° 04-376 of 4 March 2004 on litigation between Mobius and France Télécom and between Outremer Télécom and France Télécom respectively.

20 See the Matrix; Annex 2

3.1.2.2 Lessons from Asia and the Indian Ocean

3.1.2.2.1 Singapore

In Singapore, the National Regulatory Authority (IDA – Infocomm Development Authority) used its «traditional» powers related to interconnection and access in order to regulate access to submarine cables and its tariffs.

The Code of Practice for Competition in the Provision of Telecommunication Services, 2005[21] (subsection 5.3.1) requires Dominant Licensees to submit a proposed Reference Interconnection offer (RIO) to the Authority for approval. Using this competence, the IDA, in 2004, modified the RIO presented by SingTel by adding specific measures pertaining to the landing stations.

These measures concerned the following three aspects of access to international capacities provided on a submarine cable:

- access to international capacities,
- access to landing stations,
- access to backhaul;

Thus, according to the RIO terms amended at the request of the Regulator, *SingTel shall provide the Connection Service to the Requesting Licensee solely for the purposes of enabling the Requesting Licensee to*:

- access its own cable capacity owned by any Third Party, on any Cable System at the relevant Submarine Cable Landing Station; and/or
- access the cable capacity owned by any Third Party, on any Cable System et the relevant Submarine Cable Landing Station for the purpose of:
  - (i) providing a backhaul service to that Third Party who is duly licensed by the Authority; and/or
  - (ii) enabling that Third Party to transit traffic between any Cable System at the relevant Submarine Cable Landing Station being connected and another cable system.[22]

For access to Co-Location Space at Submarine Cable Landing Station, the Requesting Licensee must have acquired or enter into the following before SingTel will provide such access at those places:

- an Indefeasible Right of Use (IRU) holder to access their acquired capacity of the relevant Cable System;
- a holder of a Long Term Leased Capacity to access their leased capacity in the relevant Cable System and/or
- a cable owner of the landed submarine cable system to access their own capacity of the relevant Cable System.[23]

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[21] Code of Practice for Competition in the Provision of Telecommunication Services, 2005 issued by the Info-communications Development Authority of Singapore in exercise of the powers conferred by section 26 (1) (a) to (e) and (g) of the Telecommunications Act

[22] See Section 1.3 of the Schedule 4B. Submarine Cable Connection Service in SingTel's Reference Interconnection Offer 2005

[23] See Section 1.3 of the Schedule 4B. Submarine Cable Connection Service in SingTel's Reference Interconnection Offer 2005

These measures allow operators competing with SingTel to access capacities that they own or lease on all cables landing at the station. Moreover, these operators can also access capacities held or rented by third parties in order to offer them a backhaul service.

After a few years, the results obtained by IDA are beneficial:

- Multiple new players are landing in Singapore (today there are 7 CLS in Singapore);
- Singapore has taken advantage of a substantial increase of international bandwidth capacity and diversity. Total Submarine Cable Capacity increased from 53 Gbps in 1999 to 56 Tbps in 2010;
- Users had have access to Competitive IPLC and IDD (International Direct Dial) rates: IPLC and IDD Rates dropped more than 90 %;
- The number of ISP has grown significantly from 10 to 95 between 1999 and 2010;
- Broadband Penetration (Households) increase from 5% in 1999 to 80% 2009.[24]

3.1.2.2.2 Mauritius

The Mauritius regulator Information and Communication Technologies Authority of Mauritius (ICTA) also used its powers in the area of interconnection[25] to regulate the tariffs of international leased lines (***IPLC** International Private Leased Circuit)* supplied by its historical operator, Mauritius Telecom, part owned by and operated by France Telecom.

In accordance with Article 31 of the Mauritius law on telecoms[26], ICTA has the power to approve the tariffs of telecommunications services and it is through this approval mechanism that it proceeded to regulate the prices of the IPLCs).

In 2006, the Authority thus significantly lowered the prices of IPLCs for Mauritius Telecom. The decrease in Half-Circuit IPLC tariffs applies to four routes: Mauritius to Portugal, Mauritius to South Africa, Mauritius to India and Mauritius to Malaysia and covers a connection speed ranges from 64 to 2048 Kpbs. The new tariffs include the backhauling and local loop access in Mauritius.[27]

3.1.2.2.3 India

In 2005, using its powers of control over wholesale offer prices, the Indian regulator Telecom Regulatory Authority of India (TRAI,) capped the tariffs for international private leased circuits (IPLC) for the three most used levels of capacities – E-1, DS-3 and STM-1.[28]

In June 2007, the TRAI completed the previous measures by publishing a rule on access to **essential installations in submarine cable landing stations**.[29]

According to the terms of this rule, any operator owning a Cable Landing Station (CLS) on Indian territory must present a Reference Offer[30] for approval by the Authority (within 30 days of application of the regulation) containing the terms and conditions of access to installations as well as terms of co-

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24 Regulating Access to International Gateway – A Singapore's Experience. Presented to NTC, ITU, ASP and COE. Training Workshop Infrastructuresharing. By Liau Chie Kiong, Asst Director (Interconnection and Access), IDA, 1st September 2010

25 According to the Section 28 of the Information and Communications Technologies Act 2001

26 Information and Communications Technologies Act 2001

27 See the ICTA's public notification on IPLC's tariffs; available on www.icta.mu/documents/IPLC_tariff.pdf

28 The Telecommunication Tariff (Thirty Ninth Amendment) Order, 2005

29 International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulation, 2007. File n° 416-1/2007-FN

30 Cable Landing Station – Reference Interconnect Offer (CLS-RIO)

localisation in these stations. The Authority has 60 days to approve the offer or to modify it. After communication of these observations, the owner of the CLS must proceed to make the modifications and publish said offer within a delay of 15 days.

The regulation imposes three types of obligations in terms of access to the CLS.

- The obligation of the owner[31] of a landing station to provide access to any submarine cable system.

According to Article 3.1 of the TRAI notification of 7 June 2007, any owner of a land terminal station must:

- provide, on fair and non-discriminatory terms and conditions, at its cable landing station, access to any eligible Indian International Telecommunication Entity requesting for accessing international submarine cable capacity on any submarine cable systems [32];
- interconnect specified international submarine cable landing at its cable landing station in India in accordance with the provisions of these regulations;
- provide landing facilities for submarine cables at its cable landing station to a service provider, who has been granted licence to act as an International Long Distance Operator under the licence.
- The obligation for the owner of a land terminal station to facilitate access to a backhaul circuit for an operator.

According to Article 8.3 of the notification of 7 June 2007, "the *owner of the cable landing station shall facilitate the interconnection between the eligible Indian International Telecommunication Entity and the service providers (…) at the cable landing station for provisioning of backhaul circuit under sub-regulation."*

- The allocation of a co-localisation space for the owner of a land terminal station.

According to Article 17 of the notification of 7 June 2007, if "*the owner of cable landing station is unable to offer, due to space limitations or any other valid reason, the physical Co-location requested for by the eligible Indian International Telecommunication Entity*", it shall:

- "take reasonable measures to give an options of virtual Co-location to enable such eligible Indian International Telecommunication Entity to have Access Facilitation"
- "endeavour to provide an alternate site other than the Virtual Co-location" if this was not able to be arranged.

The interconnection between the station and the virtual co-localisation or the alternative site is the duty of the entity.

It is also interesting to note that the TRAI Regulation of June 2007 produces in annex a RIO type model for interconnection of landing stations (CLS-RIO°).

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31 "Capacity owner" means an International Telecom Carrier or Foreign Carrier or Indian International Long Distance Operator who owns capacity on the international submarine cable landing at the cable landing station in India;.

32 Eligible Indian International Telecommunication Entity, means:
(i) an International Long Distance Operator, holding licence to act as such, and, who has been allowed under the licence to seek access to the international submarine cable capacity in submarine cable system landing at the cable landing stations in India; or
(ii) an Internet Service Provider, holding valid international gateway permission or licence to act as such, and, who has been allowed under the licence to seek access to the International submarine cable capacity in submarine cable system landing at the cable landing stations in India;

3.1.2.3 Other methods of intervention

3.1.2.3.1 Adding specific measures to the licences of operators using landing stations

In paragraph 7.1.5 above, it was identified that American Law provides for a special licence regime for the establishment and operation of a cable landing station which allows the Regulator to impose specific conditions stemming from the sector regulation of telecommunications.

This kind of licence could be applied to the operators operating cable landing stations in West Africa in order to make compulsory the principles of open access to these installations into their authorisations.

There is also the example of the obligations applied to France Telecom, pursuant to Article 8 paragraph 4 of its specification, which impose to France Telecom, where it is co-investor in a submarine cable, to grant without discrimination all requests of irrevocable rights of use over the available capacity of its cable made by third operators, (see Matrix Annex 1)

3.1.2.3.2 Government built infrastructures and independent agencies

In Western Europe, there are examples of public intervention in the expansion of national broadband coverage but not in the field of international submarine cables.

In France particularly, Local Authorities have played a key role in the digital development of their regions, in partnership with operators, in granting public service delegation agreements (BOT contracts) to private operators in order to establish broadband backbones.

However, the most useful examples are in Africa mainly related to terrestrial regional backbone.

Thus, a number of Governments in Africa (including Burundi, Kenya, Rwanda, Tanzania, Uganda, etc.) have either built their own backbone networks or put their existing network assets into an independent agency as in South Africa.

In these cases, the Government usually borrows the money to get the national fibre network built and then passes the network assets to another entity to manage. For example, Orange in Kenya (formerly Telkom Kenya) will manage the Kenya Government-built backbone. The Ugandan Government backbone is being built by Huawei with Chinese loan finance and the first phase is a relatively modest 194 kms, connecting the countries main cities of Kampala, Entebbe, Mukono, Bombo and Jinja. The second phase is a 1,542km network extension that will cover 19 cities including Luwero and Nakasongola [33].

As in Uganda, the Tanzanian national backbone is being built with largely Chinese loan finance and the first part of the first phase has just been completed and the whole of the first phase will be completed by August 2010. Phase 2 (will be completed in 12 months time and will give connections to six neighbouring countries. It will also complete a redundancy ring covering Mombasa-Nairobi-Kampala-Kigali-Bujumbura-Dar-es-Salaam-Mombasa. The network will cost US$200 million, US$170 million of which will come from a Chinese loan and US$30 million of which will come from the Government. It will offer customers service level agreements and anticipates offering 99.999% network availability

The Central Africa Backbone (CAB) is based more or less on the same model but it is more complex to put together due to the involvement of several countries. It is envisaged that an investment vehicle will be set up with a legal existence with the objectives of getting the infrastructure built and maximising private investment but also to promote principle of open access to the new fibre. The World Bank should fund an

[33] FTRA, Gambia (12-13 July 20) – Work in progress, for discussion purposes: "Getting wider Broadband Access – African strategies to speed up network roll-out and access" By Russell Southwood; IUT - June 2010.

important part of the investments with the African Development Bank (AfDB), the Central African Economic and Monetary Community (CEMAC) and African Union (AU)[34]

Examples are rarer in the field of submarine cable, but the Liberia Government has incorporated the Consortium Cable Company (CCL) a special purpose vehicle (SPV) formed to own and operate the ACE landing station in Liberia.

At this stage, these Special Purpose Vehicles do not yet have a track record but it is a model that could offer a range of benefits to those wanting to achieve "open access" to a landing station.

3.1.2.3.3 Other incentive mechanisms for Open Access

In section 1.2 above, various tax exemption incentives were identified that hadd been implemented in the French overseas territories offer and these offer another approach to encouraging open access on submarine cables.

For example, the law n° 2009-594 of 27th of May 2010 for economic development of overseas departments and territories which introduced new provisions into the French tax code related to the tax exemption of a significant part of investments made in order to connect an overseas territory by submarine cable. Pursuant to this provisions and taking into account the ARCEP's decision, the tax exemption's request department may take into account the conditions of openness and access to capabilities that will be available on future submarine cable in order to give the approval for requesting tax exemption. West African Governments have the power to grant similar tax exemptions to those providing landing stations in their countries.

[34] Ibid.

4 Conclusions

On the basis of the review of the above documents, the following conclusions can be reached:

- In the West African context, submarine cables are rarely mentioned in the WATRA legislative and regulatory material but fit within the framework of interconnection agreements. The proposed submarine cable guidelines will be concerned with terms, conditions and pricing and these are all areas covered by interconnection agreement legislation.
- The interconnection agreement material – both drawn from WATRA legislation and regulation – is sufficiently detailed to be used to draft guidelines within both the spirit and the letter of WATRA member states existing legislation.
- The comparator legislation and the NEPAD Protocol introduce some new elements that may be helpful in strengthening the impact of the guidelines.
- All of the legislative and regulatory material covers how to deal with dominant market power. However, Nigeria's NCC has made the point during its review of market power that their existing anti-competitive powers were sufficient to deal with any abuses by a dominant market operator.
- In the international context, the general rules for interconnection and access can form the basis of a regulatory intervention for submarine cables. These rules should, however, be specified to adapt to the specific situation of these cables and allow the emergence of a competitive offer for international capacity.
- It is essential to deal with the main bottleneck caused by landing stations but also to allow existing operators on land connected by submarine cable to access capacity held by other suppliers such as consortium members if the cable is owned by several operators.
- There are several possible methods for imposing the necessary rules for the creation of an environment that would facilitate open access to submarine cables: granting approvals and the modification of the reference offers of the operators using landing stations, the introduction of specific measures in their licence, and regulation with a general reach as demonstrated by the unbundling regulation of the European Commission.
- There are three examples that provide a powerful vision of both regulatory framework and process: India, Mauritius and Singapore. The Indian example works well because there is a common framework for interconnection and access. It takes two approaches: firstly, an individual decision to approve the Reference Interconnect Offer of the historic operator; and secondly; general reach regulation on unbundling, which is similar to that issued by the European Commission. The landing station must be regulated under a specific licence issued by the regulator. The Indian regulations mean that new service providers have access to international capacity on the same terms as consortium members and physical access to the landing station is not unduly delayed for operators wanting to connect to it.
- In the case of ARCEP, Reunion and France Telecom, the French regulator was able to significantly lower prices but not regulate backhaul and co-location in the landing station. Furthermore, the regulator's modelled price of €900 per Mbit was significantly higher than the competitive market price of €100 per Mbit. In this case the regulator was hindered by not having all the tools it required to address the issue and the difficulty that France Telecom had the only landing station on the island. In this case, the Competition Authority proved more effective at controlling and sanctioning the company.

Part 2

Recommendations

Part 2

1 Context of the Pan African regulatory policies in the telecom sector

1.1 African Union Reference Framework for Harmonisation of Telecommunications and ICT Policies and Regulation in Africa

The African Union "Framework for harmonisation of Telecommunications and ICT Policies and Regulation in Africa" is mentioned in the Cairo Declaration, adopted on 14th of May 2008 by the second conference of African Ministers in charge of Communication and Information Technologies.[35]

The Declaration covers, among others, the following questions:

- Governance: "the African Union Conference of Ministers in charge of Communication and Information Technologies is the highest coordination body for all ICT issues/activities in the continent"
- Telecommunications/ICT Policies: Member States and Regional Economic Communities (RECs) are called "to improve their national Telecommunications/ICT policies and strategies, taking into account the reference framework proposed by the African Union"

The Reference Framework for the Harmonisation of Telecommunications/ICT Policies and Regulations in Africa, attached to this Declaration, defines the guiding principles to comply with. The reference policy and regulatory framework strengthen the principle of cooperation between the African Union Commission (AUC), RECs and other African organisations. It also acknowledge the importance to take into account the interests of all stakeholders and key actors of African telecommunication/ICT sector, namely Governments, regulators, development partners, operators, service providers, private sector and consumers.

The reference policy and regulatory framework provides a catalytic platform which aims at the creation of harmonised regional and continental policy and regulatory environment. One of its broad objectives is to "*develop integrated infrastructures and access networks as the cornerstone of the e-access, with efficient cross-border interconnectivity to provide increased access to telecommunication/ICT services for the greatest number of populations in Africa, including the improvement of connectivity of the African continent with the other continents*."

An important way to achieve this objective is to develop integrated infrastructures and access networks though the following strategies:

- Promotion of regional and intra-continental connectivity;
- Promotion of open access to infrastructure;
- Promotion of infrastructure sharing;
- Promotion of digital broadcast infrastructures/networks;
- Promotion of infrastructure/networks convergence, in particular migration to IP/NGN networks;
- Promotion of appropriate and innovative technologies that can improve universal access/service and affordability;

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[35] See: Report on the Conference of Ministers of Telecommunications and Posts. Executive Council. Thirteenth Ordinary Session. 24 – 28 June 2008; Sharm El-Sheikh, Egypt. EX.CL/434(XIII). Available on www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/docs/3_Report_of_the_Ministers_of_Telecomm._Annexes_Rev_9june_EX.CL.434%20_XIII.pdf

- Implementation of technologies/networks that comply with internationally accepted and widely spread standards, taking into account regional interconnectivity and interoperability;
- Promotion of African participation in the development of standards at regional and international levels.

1.2 WATRA initiative supported by HIPSSA in the pan African context

HIPSSA's objective is to support Regional Economic Communities (RECs) in achieving their goals in the field of telecommunications/ICT. However, the priorities of the RECs have to be in line with the priorities adopted under the African Union Reference Framework and expressed in Cairo Declaration of 2008 (see Section 1 above).

During the Abuja conference, HIPSSA and WATRA jointly put out a discussion paper related to Open Access concept entitled "Guidelines on harmonisation of access to submarine cables in West Africa, a contribution for the discussion on Open Access at pan-African level". This paper's objective was to contribute to the discussion on Open Access principles, taking place at the pan-African level. The aim is to develop a common definition, understanding, concept and guidelines on open access, in coordination with relevant stakeholders.

The paper underlines importance of Open Access and presents eminent related issues:

- Low overall levels of competition
- Lack of access to investment
- Lack of skills and capacity and trust in the provider
- Restrictions on network use and opportunities to aggregate traffic
- No authorisation or restrictions on alternative infrastructure carriers
- Lack of clear fundamental rules for third party access
- Absence of incentives for sharing of active and passive infrastructure

It also calls attention to the fact that Open Access can be promoted to adopt any of the following types of approaches:

- Encouraging commercial infrastructure sharing
- Encouraging third party providers
- Shared infrastructure consortia
- Minimum common set rules for third party access
- Infrastructure separation
- Government-built backbones and independent agencies

1.3 Abuja Declaration 2010

The last Conference of African Ministers in charge of Communications and Information Technologies held in Abuja, Nigeria, from 3 to 7 August 2010, reaffirmed the principle of harmonisation of ICT policies at national, regional and continental level.

Taking into account the above discussion paper, the Final Communication of Abuja Conference requested the AU Commission to work with the ITU and with all the development partners to continue activities on harmonisation of policy and regulations in Africa based on the platform created by the HIPSSA project in

order to implement the Reference Framework (adopted by the second conference in Cairo, on 14th of May, 2008).

2 Legal grounds for harmonization in Submarine Cable Access in West Africa

2.1 Legal statute of the ECOWAS Supplementary Acts

2.1.1 Description of the general architecture and enforcement

Pursuant to article 32 of the ECOWAS Revised Treaty, the Member States "*undertake to evolve common transport and communications policies, laws and regulations*." Moreover article 33 provides that "*in the area of telecommunications, Member States shall develop, modernise, co-ordinate and standardise their national telecommunications networks in order to provide reliable interconnection among Member States*."

According to the ECOWAS Revised Treaty, the Community adopts the following acts:

- Supplementary Acts
- Regulations
- Directives
- Decisions
- Recommendations
- Opinions

These acts are different from one another in terms of the adoption and enforcement mechanisms.

Regulations, enacted by the Council, "*shall have general application*"". Their provisions shall be binding on the Community Institutions as well as in Member states where they are directly applicable.

Directives are issued by the Council and "*shall be binding on all Member states in term of the objectives to be realised. However, Member states shall be free to adopt modalities they deem appropriate for the realisation of such objectives*". Council is also able to take decisions which "*shall be binding on all those designated therein*".

Recommendations and Opinions formulated by the Council "*are not enforceable*".36

Supplementary acts are adopted by the Authority of Heads of State and Government. Article 9(2) (a) of the Supplementary Protocol A/SP.1/06/06 amending the revised ECOWAS treaty of 1 June 2006 provides that the Supplementary Acts are annexed to the ECOWAS Treaty and they are an integral part of it.

Moreover article 9 (3) of the Supplementary Protocol provides that "*Supplementary Acts shall be binding on the Community Institutions and Member States*". The final provisions of the Acts stipulate that national law must be adapted within two years.

[36] Article 9(2) (a) of the Supplementary Protocol A/SP.1/06/06 amending the revised ECOWAS treaty of 1 June 2006

2.1.2 Principles applicable to the telecom sector

So far, ECOWAS has started to harmonise its ICT law by the adoption of six Supplementary Acts:

- Supplementary Act A/SA 5/01/07 on the management of the radio-frequency spectrum;
- Supplementary Act A/SA 2/01/07 on access and interconnection in respect of ICT sector networks and services;
- Supplementary Act A/SA 4/01/07 on numbering plan management;
- Supplementary Act A/SA/1/01/07 on the harmonization of policies and of the regulatory framework for the ICT sector;
- Supplementary Act A/SA/3/01/07 on the legal regime applicable to network operators and service operators;
- Supplementary Act A/SA 6/01/07 on universal access/service.

Principles applicable to access in telecom sector are mainly stated in two of these Supplementary Acts:

- Supplementary Act A/SA/3/01/07 on the legal regime applicable to network operators and service operators
- Supplementary Act A/SA/2/01/07 on access and interconnection in respect of ICT sector networks and services

These principles are the following:

2.1.2.1 Supplementary Act A/SA/3/01/07 on the legal regime applicable to network operators and service operators

Pursuant to article 7 of the Supplementary Act A/SA/3/01/07 on the legal regime applicable to network operators and service operators, the entrance onto ICT market depends on granting:

- Individual licence,
- general authorisation,
- or is free from requirements; entry is open but may in some cases require registration, notification or declaration within the National Regulatory Authority.

Specific conditions can be attached to individual licences and general authorisations. The Annex of this Supplementary Act sets out the list of these conditions. These are among others:

- Conditions aimed at preventing anti-competitive behaviour in telecommunication markets, and in particular measures designed to ensure that tariffs are not discriminatory and do not distort competition.
- Conditions pertaining to the access obligations applicable to companies providing ICT networks or services and network interconnection and service interoperability, in accordance with the Supplementary Act on interconnection and the obligations deriving from community legislation;
- Access obligations applicable to companies providing ICT networks or services, in accordance with the Supplementary Act on interconnection.

2.1.2.2 Supplementary Act A/SA/2/01/07 on access and interconnection in respect of ICT sector networks and services

- Obligation to interconnect (Article 7)
- Access provisions (Article 26)

New entrants are authorised to access the local loop on the basis of a pre-established schedule;

New entrants commit, in their respective proposals, to install some minimum infrastructure capacity, whereas dominant operators commit to provide access to cooper pairs to the new entrant as well as the possibility of co-location on its premises in order to facilitate unbundling.

- Non-discrimination obligation (Article 3)

Operators shall, inter alia, apply equivalent conditions in equivalent areas, and shall provide services and information to other parties under the same conditions and with the same quality as for their own services or those of their subsidiaries or partners (art. 3)

- Specific obligations imposed on SMP operator
  - obligation of cost accounting and activity based costing (Article 20),
  - publication of reference interconnect offer (Article 21),
  - cost oriented pricing (Article 23),
  - obligation to provide co-location (Article 27).
- Powers of National Regulatory Authority
  - definition of cost calculation methods (Article 6)
  - modification of interconnection agreement (Article 16)
  - identification of relevant markets and of significant market power on a relevant market (Article 19)
  - imposition of specific obligation on SMP
  - power to modify Reference Interconnection Offers (RIO) (Article 21)
  - monitoring of interconnection tariffs (Article 24)
  - dispute settlement (Article 28).

2.2 Consistency with the other regional frameworks: UEMOA directives

The legal framework of ECOWAS is not the only one applicable in West Africa, UEMOA (West African Economic and Monetary Union) [37] also issues directives and has eight members (Mali, Niger, Senegal, Guinea Bissau, Cote d'Ivoire, Burkina Faso, Togo and Benin) who are also ECOWAS members. In this circumstance, there may be differences between the approaches adopted by the two bodies and it is therefore worth seeing if and when these occur.

Both regional communities have chosen two different approaches to harmonisation. The regulation of ECOWAS was based on a broader concept of Information Communications Technology (ICT) whilst that of UEMOA is based around the concepts of telecommunications.

[37] Telecoms package of UEMOA:
- Directive No. 01/2006/CM/UEMOA related to harmonization of policies for the control and regulation of the telecommunication sector;
- Directive No. 02/2006/CM/UEMOA related to the harmonization of regimes applicable to network operators and service providers;
- Directive No. 03/2006/CM/UEMOA related to the interconnection of telecommunication networks and services
- Directive No. 04/2006/CM/UEMOA related to universal service and network performance obligations;
- Directive No. 05/2006/CM/UEMOA related to harmonization of telecommunication tariffs;
- Directive No. 06/2006/CM/UEMOA organising the general framework for cooperation between national telecommunication regulators.

In most circumstances, ECOWAS and UEMOA law does not have the same legal statute:

- Under the ECOWAS Treaty, in the context of ICT regulatory harmonization, Member States apply the supranational norms which are Supplementary Acts without any changing them. The international norm takes precedence over the national one and it is directly applicable. This is called a « monistic model » and is used to unify law.
- Under the UEMOA Treaty, the supranational norms used for ICT regulatory harmonization (Directives) set only objectives to be achieved and must be transposed with national act which implement those objectives. This is a dualist harmonisation model.

Despite these different approaches, overall, both initiatives are convergent, particularly in how they address universal service, access and interconnection, terms of establishment and control of tariffs.

However, differences exist when it comes to regimes applicable to telecommunications activities (most notably on the issue of licences).

2.2.1 Access and interconnection

ECOWAS and UEMOA law is based on common principles and rules of interconnection:

- The obligation of all operators to interconnect
- The implementation of interconnection as agreements between private companies
- The same content covering interconnection agreements
- The obligation to communicate interconnection agreements to NRA
- The obligation to publish a Reference Interconnect Offer (RIO)
- The obligation to provide a defined minimum set of services and information in the RIO
- Rules applicable to interconnection tariffs
- NRA power to settle disputes related to interconnection when the private agreement between companies is not possible.

The only point of difference which may not be problematic is related to access definition and provisions. The UEMOA directives do not clarify the definition of access and include it as a part of interconnection service despite the fact that in general interconnection is a part of access and not the reverse. In consequence, the UEMOA directives include no specific provisions related to access except in the interconnection offer.[38]

2.2.2 Authorisations or licences

The Annex of Directive No. 02/2006/CM/UEMOA relating to the harmonization of regimes applicable to network operators and service providers, provides specific obligations related to network and services access (on objective, transparent and non discriminatory terms and conditions) and this can be attached to licenses.

Finally, there are no provisions in either the ECOWAS or UEMOA framework which could prevent harmonisation of regulatory principles related to submarine cable access.

[38] See Chapter II of Directive n° 03/2006/CM/UEMOA related to the interconnection of telecommunication networks and services

2.3 Proposition of harmonisation model in the field of submarine cable access

2.3.1 Relevant base for harmonisation

As the ECOWAS regional regulatory framework for ICT takes precedence over the national frameworks, the most appropriate base for the harmonisation model in the field of submarine cable access is the ECOWAS ICT framework.

2.3.2 Way of harmonisation

The ECOWAS Treaty allows mainly 2 methods of harmonisation depending on the nature of the pertaining acts:

2.3.2.1 Acts of primary law

The revised Treaty establishing ECOWAS (1993), has a Supplementary Protocol A/SP.1/06/06 amending the revised ECOWAS treaty, Telecoms package including 6 Supplementary Acts belong to primary law binding on signatory States[39].

There are also draft Supplementary Acts: A/SA/12/08 on electronic transactions and A/SA/12/09 on guidelines for the protection of personal data in ECOWAS which would be included in the same category of acts.

2.3.2.2 Secondary Legislation

As we understand it, the draft Directive D/12/09 on combating cyber crime in ECOWAS will be categorised as secondary legislation binding on all the Member States in terms of its objectives.[40].

The Protocol A/SP.1/06/06 of 1 June 2006 also mentions other categories of acts called: regulations, decisions, recommendations and opinions. So far, we have no examples of them in the field of telecommunications.

2.3.2.3 A possible third approach

Despite the review of 2006, acts of primary law and secondary legislation are subject to a lengthy adoption process.

In this context and taking into account the pressing need for specific rules to foster access to international bandwidth, we believe that a more flexible approach would be appropriate.

The Supplementary Act A/SA 2/01/07 on access and interconnection in respect of ICT sector networks and services and the WATRA objectives allow us to adopt this approach:

- Article 5 of Supplementary Act A/SA 2/01/07 provides that: ”Member State shall ensure that their national regulation offer solutions to the difficulties encountered in implementing interconnection, including following problems and challenges: (…)

  c) Existence of guidelines for the negotiation of interconnection contract;”

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[39] Article 9 (3) of Supplementary Protocol A/SP.1/06/06 amending the revised ECOWAS Treaty of 1 June 2006 "*Supplementary Acts adopted by the Authority shall be binding on the Community Institutions and Member States …*"

[40] Article 9 (5) of Supplementary Protocol A/SP.1/06/06 amending the revised ECOWAS Treaty of 1 June 2006: "*Directives shall be binding on all the Member States in terms of the objectives to be realized However, Member States shall be free to adopt modalities they deem appropriate for the realization of such objectives*."

- WATRA objectives include: Harmonisation of Policy and Regulatory Frameworks towards Establishing a Common Telecoms Market, particularly by developing common regulatory guidelines which will take into consideration realities of new and emerging trends in telecommunications worldwide.

On this basis, our recommendation is to produce some WATRA guidelines for access to submarine cable in West Africa, providing a model available to National Regulatory Authorities which would allow them to clarify the conditions under which they apply the ECOWAS supplementary acts' provisions (and thereafter, if it is necessary the national regulation) in the field of submarine cables access.

This model of guidelines should be agreed by a WATRA Ad-hoc Working Group on Access to Submarine Cables in co-operation with all the stakeholders in the telecommunications sector.

Therefore, the outcomes from this study will be as follows:

- The harmonisation of principles and rules applicable to submarine cable access for the benefit of society and economy in West Africa;
- The inputs of the comparative analysis of the WATRA regulatory frameworks and the International regulatory frameworks in the field of open access; (the findings of this analysis are summarised in Part 1, 2. Overall Conclusions above).
- The specific challenges of access to international bandwidth through landing stations;
- General recommendations in terms of geographic scope and tools of regulation.

2.3.2.4 The specific challenges of access to the international bandwidth

Four new international submarine cables will connect West Africa by the year 2012[41] which will theoretically increase the capacity of available international bandwidth. However, the landing of new cables will not be efficient without an appropriate and effective regulatory environment.

In other words, the governments should impose detailed access terms and conditions on the owners of the cable landing stations (CLSs) in order to remove the existing barriers to access to international bandwidth:

De facto, these barriers are still numerous and include:

- Access restrictions to cable landing stations or complete lack of access
- High charging rates for access service and no transparency of charging
- Denial of collocation in CLSs whereas collocation would allow international operators to operate international capacity from the landing station on their own, therefore not having to be rely on the incumbent operator and therefore to be independent.
- A shortage of International gateway licences
- A monopoly covering the trading of the international capacities
  - Anyone buying capacity has to get it from international gateway licensee (generally only incumbent operator is eligible) and cannot buy capacity from other international operators (consortium members or IRU holders) even though it is available.
  - These practices are often brought about by a management structure of the cable landing station, operated by the incumbent operator having dominant market power.

[41] GLO-1, WACS, ACE and Main-One

- Only one CLS per country
  - Some countries (especially those with significant traffic) have not licensed more landing stations despite requests from companies building new international fibre cables

There are particular problems of submarine cable access for landlocked countries in order to reach the cable landing station. Those problems are not covered by this study but need careful examination in another study.

To summarize, in order to provide access to international bandwidth the following issues require attention:

- Alternative service providers need to have access to the international bandwidth capacity under the same terms as the consortium members, if the cable is owned by several operators.
- Access facilitation (including to other consortium members) should not be unduly prevented or delayed by the consortium member having control over cable landing station;
- Transparent and non-discriminatory access with transparent charges at cable landing stations need to be established;
- Co-location at landing facilities need to be authorised;
- Responsibilities in terms of functioning should be well defined;
- Time limits for execution of access and collocation provision have to be defined as well as minimum period of access and collocation.

Part 2

3 Recommendations

3.1 The perimeter of the regulation

In terms of their physical scope, submarine cable networks are formed of 3 blocks:

• The undersea portion of cable;	⇨	**Wet portion**
• Cable Landing Station (CLS) and equipment • Backhaul equipment (between the CLS and the POP of the third operator)	⇨	**Dry portion**

The beach manhole or beach joint is the border between land and sea. It is important to note that national jurisdiction stops at the wet portion of the cable in the exclusive economic zone. The wet portion of the submerged submarine cable in high sea is subject to Public International Law.

Access blockages to submarine cables that prevent the effective use of international bandwidth, exist on the in the following parts of the physical scope described above: international capacities (transported on the undersea portion of cable), cable landing stations and backhaul equipment.

Measures have to be undertaken on all 3 levels as described below:

3 levels of regulation		
Access to International capacities	**Access to Cable Landing Station**	**Access to Backhaul**
• Regulation of landing of submarine cables in the country (transparency, more than one CLS)	• Regulation of access to the cable landing station (access obligation, collocation, tariffs control trough RIO publication etc.)	• Regulation of access to the backhaul links between the CLS and the point of presence of domestic operators (alternative backhaul links, access to incumbent backhaul links etc.)
• Regulating access by additional operators to submarine cable (Cable landing operators authorised to provide capacity to all operators)		
• Regulation of access to IPLC		

3.2 The different tools of the regulation

There are two main ways of regulating:

- Reference Interconnection and Access Offers (RIO) regulating access by third party operators to submarine cables on the basis of the open access principles:
  - Non discrimination;

  - Transparency
  - Cost oriented pricing
- Licences to cable consortia or CLS owners;

Otherwise, two other tools could also help in implementing an open access model to submarine cables:

- Competition Law and,
- Separation of the ownership of the CLS inside a Special Purpose Vehicle, i.e.: a separate legal entity often called SPV, which is controlled in a certain extend by a public authority through a PPP scheme. There are various PPP schemes depending on the allocation of risk between the public and the private entities.

These issues are not the main focus of this paper but may be considered as both complementary and helpful solutions.

3.2.1 Reference Interconnection and Access Offers

Since the publication of a Reference Interconnection and Access Offer is an obligation on an operator with Significant Market Power it can also be used as a tool for regulation of submarine cable access.

The RIO establishes the legal, operational and technical aspects of interconnection (terms and conditions) according to which interconnection (and access) is provided. Obligations introduced by regulatory framework are detailed in the RIO. This document must be approved by regulatory authority which moreover has the right to modify it. The RIO defines the price list and technical services offered. It covers following issues:

- Services for the routing of switched traffic
- Leased lines
- Interconnection links
- Supplementary services and implementation arrangements therefore
- Description of all points of interconnections of access thereto, for the purposes of physical collocation
- Comprehensive description of proposed interconnection interfaces, including the signalling protocol and possibly the encryption methods used for the interfaces
- Technical and tariff conditions governing the selection of carrier and portability[42]

Moreover, tariffs have to respect the principle of whatever cost calculation method is specified (NB: the NRA establishes the methodology for calculating interconnection costs).

Therefore, within the RIO, interconnection, access, collocation and leased lines on submarine cables could be regulated. RIO should cover minimal contents as follows:

- Connection services charges,
- Collocation charges (including virtual and alternative co-location)
- Payment terms,
- Time limits for execution of access and collocation,
- Minimum period of co-location agreement.

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[42] Article 21 of Supplementary A/SA.2/01/07 on access and interconnection in respect if ICT sector networks and services

3.2.2 Licenses

In regulatory terms, a submarine cable landing station requires an international gateway licence. Despite requests from the companies building new international fibre cables, West African countries with significant traffic have not licensed more than one cable landing station. Often, international gateway licences are held only by the incumbent or by a limited number of other international gateway licence holders. This situation results in delays or restrictions to access by independent operators or those without gateway licences.

As underlined in the Briefing Paper prepared for the Workshop on undersea cable regulation[43]:

"*The most obvious way to create competition for this kind of monopoly is to licence access to other operators in the country. (…)*

This process can be taken a step further by offering international gateway licences to other entities, particularly independent international cable operators. For example, East Coast cable operator Seacom was granted a licence to operate in Tanzania, whereas in South Africa, this opportunity did not exist and it had to go into a partnership with an international gateway licence operator Neotel. (…)

Countries like Ghana and Nigeria have stated very publicly that they welcome any company seeking to provide international landing stations and there are no restrictions on licensing. Not surprisingly, both countries will have five landing stations by 2011."

Whatever the number of landing stations and if there is only one cable landing station in the country, it would be useful to introduce, in appropriate licenses, some specific provisions which are relevant to facilitate access to submarine cables.

Taking into account the ECOWAS ICT framework (Supplementary Act A/SA/3/01/07 on the legal regime applicable to network operators and service operators), the list of conditions which can be attached to licenses are following:

- Conditions aimed at preventing anti-competitive behaviour in telecommunication markets, and in particular measures designed to ensure that tariffs are not discriminatory and do not distort competition;
- Conditions pertaining to the access obligations applicable to companies providing ICT networks or services and to network interconnection and service interoperability, in accordance with the Supplementary Act on interconnection and obligations deriving from community legislation;
- Access obligations applicable to companies providing ICT networks or services, in accordance with the Supplementary Act on interconnection.

Therefore, specific conditions imposed within licenses can ensure that operators provide international leased lines, access and collocation specifically whereas the operator licensee owns and/or operates a CLS.

3.2.3 Competition Law

A declaration that the landing station is an "Essential Facility" could allow the regulator to bring competition law into play and it may also justify some of the regulatory approaches suggested above as the idea is part of case law in many countries.

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[43] "*International bandwidth: Tackling blockages to access*", a briefing paper prepared for the workshop on Undersea Cable Regulation, held in Accra, Nigeria, from 17-18 November 2009

However, there are several reasons for not specifically include this recommendation in the WATRA guidelines:

- Currently, the implementation of a regional competition law in West Africa still faces many challenges such as coexistence within the same geographical area of several community (in particular several states are member of two organizations) and the delineation of substantive jurisdiction of the various integration bodies (OHADA, UEMOA and ECOWAS all have different competition law);
- The previous analysis made country by country in the ECOWAS territory, has shown that the use of Essential Facility as a defining term (targeted or not at submarine cable landing stations) is not mentioned in current legislative and regulatory frameworks. Only Ghana's documents have a reference to it:"…a network or other essential facility." (§ 5, Part. I);
- The definition of the CLS as being an essential facility would require the inclusion of specific provisions in the ECOWAS regulatory framework of ICT and therefore in national rules [44];
- In event of there being a monopoly operator of a landing station, legislative and regulatory frameworks covering dominant market power and abuse of dominant position may be relevant and sufficient.

At this stage, we do not consider it necessary to suggest declaring ex ante CLS – operated in monopoly – as being essential facilities in the WATRA guidelines.

3.2.4 Separation of the ownership of the CLS inside a Special Purpose Vehicle, funded through a Public Private Incentive.

It is interesting to notice that some countries have sought to hold international fibre assets "in trust" to prevent lack of access to international bandwidth, as examples:

- The Lesotho regulator LTA became the vehicle for investing in WIOCC, the Special Purpose Vehicle within EASSy.

  Following extensive dialogue amongst all of the stakeholders, a mutual understanding was reached by governments concerned, telecom operators and a number of Development Finance Institutions around a hybrid project structure involving both direct consortium members and an SPV of certain East African Countries that met the Governments' developmental objectives of ensuring low-cost open access to international connectivity, while providing for financing flexibility and maintaining the commercial appeal of the EASSy Project.

  The SPV was established to create a vehicle to leverage debt financing from the DFIs and to reduce the upfront equity requirements of certain operators who wished to avail themselves of financing. Thus, in this "hybrid" structure, the larger telecom companies invested directly in their own right, while a number of smaller ones invested through an SPV, named WIOCC.
- The Liberia Government has incorporated the Consortium Cable Company (CCL) a special purpose vehicle (SPV) formed to own and operate the ACE landing station in Liberia and is now launching a study to create an appropriate regulatory environment for the landing point, access to the landing point and capacity, capacity resale etc.
- In French Overseas Departments, Guadeloupe has decided to build itself a submarine cable. Guadeloupe has launched a Call for Tenders in order to delegate the conception, installation and exploitation of submarine cable called "Guadeloupe Numérique" to a private entity. The

[44] See the example of the South African Electronic Communications Act of 2000. It defines an ''electronic communications facility'' to include undersea cables and landing stations, while an "electronic communications network" includes undersea7 fibre optic cables. Article 43 designates submarine cables and satellite earth stations as being essential facilities.

winner was the company Global Caribbean Network (joint venture of Group Loret and SEMSAMAR). Its cable network is 890 km and its different segments connect different Caribbean islands, including Puerto Rico.

Obviously, this kind of organisation allows regulators to be in a position to set the terms for sale of and access to this capacity. It means that regulator can set the terms of access to the capacity it held in an equitable way that might not have been the case if the incumbent operator had been the investor.

4 Conclusions

Experience shows that appropriate regulation of the telecom sector, and in particular of bottlenecks which curb the development of competition, has positive effects in terms of investment, digital uses growth and therefore a positive impact in terms of economic and social development.

In the particular case of access to international capacity at affordable rates – necessary for a country to integrate the global digital economy – the success of the regulation established in Singapore is a good example (see page 21).

The Singapore regulator (IDA) has mandated co-location at Dominant Licensee's CLS and required Dominant Licensee to provide Connection Services under the RIO and at cost-oriented prices determined by IDA.

After only a few years, the results achieved by this regulation are very positive:

- Many new players came to Singapore (7 CLSs in Singapore);
- There was a substantial increase in international bandwidth capacity and diversity (Total Submarine Cable Capacity increase from 53 Gbps in 1999 to 56 Tbps in 2010);
- Users have access to Competitive IPLC rates (which have fallen by more than 90 %) and IDD rates[45] (which have also fallen by more than 90%);
- There has been a significant growth in the number of ISPs (from 10 to 95 between 1999 and 2010);
- Broadband Penetration (measured by household access) increased from 5% (1999) to 80 % (2009);

This study and the related guidelines are intended to enable WATRA regulators to make the same positive impact on the telecoms markets and the economic development of their countries by providing them with the generic model for appropriate regulation of access to international capacity available through the submarine cable connecting West Africa.

This study identifies potential bottlenecks in access at an affordable price to the international capacity of submarine cables and it suggests means and tools used by regulators to remedy them.

These solutions, which have proven themselves in other countries, must nevertheless be adapted by each regulator depending on the situation of the relevant national market.

However, work still remains to be carried out collectively within WATRA in order to complete the proposed measures and make them more operational.

In particular, the determination of relevant costs on which to base control of interconnection cost orientation, access and co-location charges is a complex task.

Moreover, the harmonisation of costing methods used by regulators would present the advantage of giving operators, most often present in several countries, visibility at a regional level, and avoid creating disincentive effects with regard to investment in one country over another.

In this context it would be useful to extend this study by:

- developing a common method of relevant costs accounting to be taken into account in the pricing of co-location and access services at CLS as well as IPLC and IRU required by third operators;

[45] International Direct Dial

- Recommending methods of control on wholesale rates provided by operators taking into account that cost orientation is by far the most common method of price control, but not the only one. There are other methods with their advantages and disadvantages and they are not all mutually exclusive:
  - price cap
  - retail minus
  - both cost orientation and price cap
  - benchmarking etc.

Therefore, for a transitional period during which some operators have do not yet have implemented cost accounting, it would be useful for WATRA to monitor the market price per Mbit on submarine cables connecting Africa.

Finally, the implementation of the recommendations of this study involves completing the transposition into national law of the ECOWAS Supplementary Acts related to ICT for those countries which have not yet done so.

Annexes

Annex 1

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Annex 2: International legal and regulatory references' matrix

World Trade Organisation	**Authorisation and Licensing Agreements**
General Agreement on Trade in Services. Annex on Telecommunications (1994)	**Article 20 (XX) of GATS**: Each Member shall set out in a schedule the specific commitments it undertakes. The schedule specifies among others terms, limitations and conditions on market access. The entrance onto the market, according the country, depends on obtaining a licence or is subject to a general authorisation regime.
Telecommunications Services: Reference Paper. Negotiating group on basic telecommunications. 24 April 1996	**Article 4**: If the licensing system is adopted, the principles contained in the document references apply. In particular, the following should be made publicly available: – all the licensing criteria, – the period of time normally required to reach a decision on the allocation of a licence, – the terms and conditions of individual licences. In addition, the reasons for the denial of a licence are to be made known to the applicant upon request. Licence revocation and suspension procedures must be equally transparent and based on objective criteria.
	Access / Interconnection
General Agreement on Trade in Services. Annex on Telecommunications (1994)	**Article 5 a) ii)** (Annex) requires a regulation to establish the right of competitors to interconnect.
Telecommunications Services: Reference Paper. Negotiating group on basic telecommunications 24 April 1996	**Article 2.2**: Interconnection must be ensured at any technically feasible point. The interconnecting service must be sufficiently unbundled to exclude payment for components or facilities not required for the supply of the service. Interconnection must be supplied in a timely fashion. Quality must be no less favourable than that provided to the own production of similar services. Rates must be transparent, cost-oriented and reasonable, having regard to economic feasibility.

Annex 2

World Trade Organisation	**Monopoly / Market Power**		
	Anti-competitive practices and definition of operators with significant market power	Transparency	Essential facilities
General Agreement on Trade in Services. Annex on Telecommunications (1994)		**Article 4 of the Annex**: The requirement of transparency concerns the publication of relevant information on conditions affecting access to and use of public telecommunications transport networks and services	
Telecommunications Services: Reference Paper. Negotiating group on basic telecommunications. 24 April 1996	**Article 1** requires appropriate regulation to prevent major suppliers from engaging in or continuing anti-competitive practices, such as: – Engaging in anti-competitive cross-subsidization; – Using information obtained from competitors with anti-competitive results; – Withholding timely technical information about essential facilities and commercially relevant information needed by competitors to supply.	**Article 2.4**: Major suppliers should be required to either publish their interconnection agreements or a reference interconnection.	The Reference Paper defines an essential facility as *"facilities of a public telecommunications transport network or service that: (a) are exclusively or predominantly provided by a single or limited number of suppliers; and (b) cannot feasibly be economically or technically substituted in order to provide a service."*
World Trade Organisation	**Implementation**		
Telecommunications Services: Reference Paper. Negotiating group on basic telecommunications. 24 April 1996	**Article 2.5**: A service supplier requesting interconnection with a major supplier will have recourse to dispute settlement procedure.		

Annex 2

European Union	**Authorisation and Licensing Agreements**
	Authorisation and Licensing System
	OPEN NETWORK PROVISION ("ONP")
Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services	**Article 2**. Member States must liberalise the telecommunications sector and withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony (liberalised in 1998). They shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services. When Member States make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements they shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against such refusal.
Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services	This Directive sets out the general authorisation and individual licence regime. **Article 7** limits the individual licensing regime to certain cases. **Article 4** harmonises the conditions that can be attached to general authorisations. Voice services and the establishment of public telecommunications networks or other networks using frequencies can still be subject to an individual licence.

Annex 2

European Union	Access / Interconnection
	ONP
Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services	**Article 4**: Member States shall take the necessary steps to make public, objective and non-discriminatory conditions of access to networks including those who are still subject to exclusive or special rights.
Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision	The ONP directive defines conditions of open network provision (technical interfaces, usage conditions, tariff principles) that must be non-discriminatory, transparent and based on objective criteria (**Article 3**). The Directive's Annex establishes the procedures and steps needed to extend the principles of open network provision for new access services (leased lines, data transmission, ISDN, mobile services etc..).
Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)	The provision of telecommunications services and infrastructure in the Community will be liberalised from 1 January 1998 (with transition periods for certain Member States). This directive ensures and harmonises the interconnection of public telecommunications networks and telecommunications services available to the public. Member States shall remove any restrictions which prevent authorised organisations to provide public telecommunications networks and publicly available telecommunications services from negotiating interconnection agreements between themselves (**Article 3**). **Article 4**: The interconnection access is as much a right as it is an obligation (symetric regulation) for operators. Specific obligations are imposed on operators which have significant market power (defined in Appendix I). They shall meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of users.

Annex 2

European Union	**Monopoly / Market Power**	
	Pricing and no princing obligation	Essential facilities
	ONP	
Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision	This directive establishes a framework for harmonized pricing principles relating to the provision of open networks. **Annex II**: Tariffs must be: – based on objective criteria, – cost-oriented, – transparent and properly published – non-discriminatory and guarantee equality of treatment.	
Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services	Member States communicate to the Commission each increase of tariffs for leased circuits and related information, needed to assess the merits of these increases. They ensure that there is no discrimination regarding tariffs (**Article 4 and 5**).	
Communication from the Commission on the application of the competition rules to access agreements in the telecommunications sector – framework, relevants markets and principles. OJ C 76, 11.3.1997		This Communication provides a definition of essential facility: *"facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means".*

Annex 2

European Union	**Implementation**
	Settlement of disputes
	ONP
Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)	**Article 9§5**: National Regulatory Authority (NRA) resolves the dispute related to the interconnection.

Annex 2

European Union	**Authorisation and Licensing Agreements**				
	Authorisation and licensing system	Restriction on access	Technology neutrality	Licences for cross-border routes	Right of way
	Telecom Package				
Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)	The general rule is the general authorisation system. It means a simple declaration which guarantees the right to any operator to provide network or electronic communications services on condition that the obligations contained in specifications are respected. Exception: right of use for radio frequencies or numbers is subject to individual licence (**Article 6§4**).	Non applicable		The Foreign companies are subject to the same general authorisation regime.	
Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)	**Article 3§1**: A foreign company can request access or interconnection without being authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.				
Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)			**Article 8 § 1** recommends technological neutrality without making it mandatory in every case.		**Article 11§1**: Rights of way must be granted by a competent authority without delay or discrimination in respect of transparent and publicly available procedures.

European Union	**Authorisation and Licensing Agreements**
	Technology neutrality (suite)
Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC (Framework Directive, Access Directive, Authorisation Directive)	The amending Directive tries to strengthen the principles of technological neutrality and service neutrality regarding the spectrum – Preamble 34 to 40. By way of example:"*(34) Flexibility in spectrum management and access to spectrum should be increased through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with Community law (the "principles of technology and service neutrality"). The administrative determination of technologies and services should apply when general interest objectives are at stake and should be clearly justified and subject to regular periodic review*." These principles are translated into points 10 and 11 of article 1 of the Directive of 2009 which amend article 9 of the Framework Directive: "*(...) Member States shall ensure that all types of technology used for electronic communications services may be used in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Community law.* *Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of radio network or wireless access technology used for electronic communications services where this is necessary to: Les États membres peuvent toutefois prévoir des restrictions proportionnées et non discriminatoires aux types de réseau de radiocommunications et de technologie sans fil utilisés pour les services de communications électroniques si cela est nécessaire pour:* *(a) avoid harmful interference; a) éviter le brouillage préjudiciable;* *(b) protect public health against electromagnetic fields; b) protéger la santé publique contre les champs électromagnétiques;* *(c) ensure technical quality of service; c) assurer la qualité technique du service;* *(d) ensure maximisation of radio frequency sharing; d) optimiser le partage des radiofréquences;* *(e) safeguard efficient use of spectrum; or e) préserver l'efficacité de l'utilisation du spectre; ou* *(f) ensure the fulfilment of a general interest objective in accordance with paragraph 4.* *4. Unless otherwise provided in the second subparagraph, Member States shall ensure that all types of electronic communications services may be provided in the radio frequency bands, declared available for electronic communications services in their National Frequency Allocation Plan in accordance with Community law. Member States may, however, provide for proportionate and non-discriminatory restrictions to the types of electronic communications services to be provided, including, where necessary, to fulfil a requirement under the ITU Radio Regulations. 4. Sauf disposition contraire du deuxième alinéa, les États membres veillent à ce que tous les types de services de communications électroniques puissent être utilisés dans les bandes de fréquences déclarées disponibles pour les services de communications électroniques dans leur plan national d'attribution des fréquences conformément à la législation communautaire. Les États membres peuvent toutefois prévoir des restrictions proportionnées et non discriminatoires aux types de services de communications électroniques à fournir, y compris, si nécessaire, pour satisfaire à une exigence du règlement des radiocommunications de l'UIT.* *Measures that require an electronic communications service to be provided in a specific band available for electronic communications services shall be justified in order to ensure the fulfilment of a general interest objective as defined by Member States in conformity with Community law, such as, and not limited to: Les mesures imposant qu'un service de communications électroniques soit fourni dans une bande de fréquences spécifique disponible pour les services de communications électroniques se justifient par la nécessité d'assurer la réalisation d'un objectif d'intérêt général tel que défini par les États membres conformément à la législation communautaire, tel que notamment, mais non exclusivement:* *(a) safety of life; a) la sauvegarde de la vie humaine;* *(b) the promotion of social, regional or territorial cohesion; b) la promotion de la cohésion sociale, régionale ou territoriale;* *(c) the avoidance of inefficient use of radio frequencies; or c) l'évitement d'une utilisation inefficace des radiofréquences; ou* *(d) the promotion of cultural and linguistic diversity and media pluralism, for example by the provision of radio and television broadcasting services. d) la promotion de la diversité culturelle et linguistique ainsi que du pluralisme des médias, par exemple par la fourniture de services de radio et de télédiffusion.* *A measure which prohibits the provision of any other electronic communications service in a specific band may only be provided for where justified by the need to protect safety of life services. Member States may, exceptionally, also extend such a measure in order to fulfil other general interest objectives as defined by Member States in accordance with Community law.*

Annex 2

France	**Authorisation and Licensing Agreements**
	Example related to French mobile licences and France Telecom's specifications (old one) for its activityover submarine cables
Recent example in France as a part of authorisations related to the use of 3G spectrum and, in the near future, new licences 4G	Regarding the granting of 3G frequencies and the project of 4G licensing, significant progress have been obtained by the French regulator (ARCEP) for access to the wireless local loop. After the ARCEP decision establishing the principles of facility sharing between operators of 3G network, the French mobile operators concluded (February 11, 2010) a framework agreement for sharing 3G facilities based on the deployment of a 3G radio-access network sharing (RAN sharing) on the territories of low density. This deployment, which will be completed by end of 2013, goes beyond the coverage requirements of the three French 3G operators. The fourth 3G licence which was granted to FREE on the 13th of January 2010 takes up its commitment to provide access to FULL MVNOs across its network once it has reached a coverage rate of 25% of the population. The current consultation on the conditions of attributions of future 4G licences, and associated specifications, already provides an ex ante obligation to share frequencies and a posterior obligation to provide roaming on certain areas of the territory. The candidates' commitment on the MVNO's access conditions should be part of the selection criteria.
Example of submarine cables – the specifications of France Telecom under the decree of March 12, 1998 as amended, authorizing France Telecom to build and operate a publicly available telecommunications network and to provide publicly available telephone service	Pursuant to Article 8 paragraph 4 of its specification, where France Telecom is co-investor in a submarine cable, it grants without discrimination all requests of irrevocable rights of use over the available capacity of its cable made by operators authorized under Article L. 33-1 (old) of the Code of Posts and Telecommunications. This provision has disappeared from France Telecom's recent specifications.

Annex 2

European Union	**Access**					
	Physical Access		Interconnection	Logical Access		Service & maintenance charges
	Network elements access including the unbundling	Colocation and infrastructure sharing		Information systems (SI) access	Specified services access	
	Telecom Package					
Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)	**Article 12 § 1a**: The National Regulatory Authority (NRA) has the right to require that operators designated as having significant market power (SMP) unbundle the local loop.	**Article 12§1f**:An undertaking with significant market power may be required to provide co-location or other forms of facility sharing. Moreover, this sharing should be encouraged by the NRA on the basis of voluntary agreements.	**Article 4§1**: Interconnection is a symmetrical obligation, which applies to all operators, i.e it is independent of the power of the operator on the market.	**Article 12§1h**: The NRA may require the SMP operator "*to provide access to operational support systems or similar software systems* " (IS).	**Article 12§1g**: The SMP operator may be obliged "*to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks".*	
Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)		**Article 12§1**: The co-location and sharing of other physical resources are encouraged by the NRA when a company providing electronic communications networks has the right of way over public or private domain and of expropriation (easement).				
Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop	Article **3§2**: Operators designated as having significant market power shall, from 31 December 2000, provide unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions					Conditions for access to notified operators' operational support systems, IS or DB for pre-ordering, provisioning, ordering, maintenance and repair requests and billing must be included in the reference offer (Annex).

Annex 2

France	**Access**
	French case: enforcement on submarine cables
Décision n° 97-455 du 17 décembre 1997 de l'Autorité de régulation des télécommunications portant adoption de lignes directrices sur les conditions d'accès aux câbles sous-marins	In 1997, ART (later ARCEP) adopted guidelines in order to clarify the conditions under which it may apply the legal provisions relating to access to the systems of submarine cables. In this paper, ART considers that it is competent to intervene in the following three ways: - under the general powers of control and sanction over operators authorised on the French territory (Article L. 36-7 of the CPCE); - under the interconnection and access regime (Articles L. 34-8 and L.36-8 CPCE), particularly in the context of a dispute over terms of interconnection to cable landing stations; - to control the compliance with the specifications associated with the licences (pursuant to Articles L. 33-1 and L. 34-1). Regarding the acquiring of IRU, the Authority considers that it may intervene to control the respect for relevant provisions of the France Telecom specifications on cable landing systems on French territory. The requirement of non-discrimination laid down in this specification shall be understood as France Telecom's obligation to grant irrevocable rights of use to any requesting operator of public network authorized under Article L. 33-1 – on conditions equivalent to those granted to its own subsidiary or partners. As a result of those provisions, when the capacity is not exhausted or subject to contractual commitments resulting from the construction and maintenance agreement, these provisions oblige France Telecom to grant IRU on the same conditions to those it enjoys as a member of consortium. If the construction and maintenance agreement does not confer exclusive rights or preferential terms to the owners, the third party operators go directly to the consortium. The principle of non-discrimination applies also to the IRU on capacity initially acquired by France Telecom and which it no longer uses. The conditions of carrying the traffic of third party operators between their network and landing stations on the French territory are a matter of the general regime of interconnection. From the foreign experience point of view, two special procedures for interconnection can be implemented: - At the cable landing (however the lack of equipment at these sites could limit its effectiveness); - For leased circuits in order to allow the operator requesting IRU to connect its national network to cable landing stations. If those services are not included in the interconnection offer, the conventions are subject to trade negotiations and a priori the Authority is not competent to intervene. Disputes relating to these conventions may also be brought befor the Authority for resolution. When it is necessary to ensure equal conditions of competition or interoperability of services, the Authority may, after consulting the Competition Council, require the modification of the agreements already concluded.

Annex 2

European Union	**Access**
	French case: implementation to submarine cables
Décision n° 04-0375 et 04-0376 de l'Autorité de régulation des télécommunications en date du 4 mai 2004 se prononçant sur des différends opposant Outremer Télécom et Mobius à France Télécom	In 2002: opening of the service on the first submarine cable connecting Reunion Island. France Telecom has an exclusive right and its price is 16,000€ per MGbit and per month for a lease line. In January 2004 France Telecom competitors for Internet access services brought a complaint before the ARCEP - They provided a cost model showing that a cost oriented price for a lease line should be 1,550 € per month and per MGbit - In May 2004 the ARCEP made its decision: the ARCEP cost model showed a price of 574€/per month in 2004 and per MGbit for transportation on the Sat3/WASC/SAFE cable between Reunion Island and Portugal and of 887€ if we add the backhaul service in Reunion Island and the transport from Portugal to Paris; Due to the demand of the FT's competitors, the ARCEP imposed to FT to cut its prices on the base of 1550€ per month and per MGbit
Décision n° 09-D-24 du 28 juillet 2009 relative à des pratiques mises en œuvre par France Télécom sur différents marchés de services de communications électroniques fixes dans les DOM	In July 2009 the Competition Authority sentenced France Telecom for abuse of dominant position for the same practice as well as others: a) Fines of 27 million € b) Practices condemned: - Excessive pricing - Price squeeze - Refusal to provide a security service to its competitors During the investigation the Competition Authority obtained that other members of the consortium were authorized to provide capacities. In 2008 thanks to such competition price almost reached **100€ per month and per MGbit**

Annex 2

European Union	**Monopoly / Market Power**				
	Princing obligations: princing control and cost-oriented princing	Non princing obligations			
		Transparency	Non-discrimination	Accounting separation	Accounting separation
	Telecom Package				
In brief – grounds of intervention	The European Commission considers that sectoral regulation (ex ante) is a necessary transition towards a fully liberalised market where the common law of competition (ex post) is sufficient to fair functioning of the market. Therefore, this sectoral regulation is generally reduced according to the progress of liberalization. The market analysis procedure introduced by the directives of the Telecom Package (2002) is specifically made to determine "market by market" if it is necessary or not – for each market identified as relevant, to regulate of those markets. This procedure consists of three steps (for each market): a) analysis to determine whether the market is sufficiently competitive. During this first stage, the NRA must prove that the market meets the three following criteria: - the presence of high and non-transitory barriers to entry. These may be of a structural, legal or regulatory nature; - a market structure which does not tend towards effective competition within the relevant time horizon, - the insufficiency of competition law alone to adequately address the market failure(s) concerned. If the market meets the three criteria, it is considered as a relevant one which means it can be regulated. b) then NRA identifies the operators with significant market power on these markets; c) finally, the NRA fixes remedies by imposing on operators the obligations (limited in time, in general 3 years). After this period, the market is again analysed to determine whether the regulation must be maintained, enhanced or suppressed according to the progress competition in the market				

Annex 2

European Union	**Monopoly / Market Power**				
	Pricing obligations: pricing control and cost-oriented pricing	Non princing obligations			
		Transparency	Non-discrimination	Accounting separation	Accounting separation
	Telecom Package				
Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)	**Article 13**: The obligation of cost-oriented pricing can be imposed on the SMP operator.	**Article 9**: Transparency obligation in relation to interconnection and/or access may be imposed on SMP operators. It requires operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.	**Article 10**: Obligation of non discrimination can be imposed on SMP operator. It means that "*the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of it subsidiaries or partners*."	**Article 11**: An SMP operator can be obliged to establish an accounting separation in relation to specified activities related to interconnection and/or access.	
Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)					**Article 13**: Accounting separation can be imposed on undertakings providing public communications networks or publicly available electronic communications services which have special or exclusive rights for the provision of services. It means they have to (a) keep separate accounts for the activities associated with the provision of electronic communications networks or services; (b) have structural separation for the activities associated with the provision of electronic communications networks or services.
Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC (Framework, Access, Autorisation Directives)				**Article 13 a** adds a possibility of fonctionnal separation.	

Annex 2

European Union	**Implementation**			
	Settlement of disputes	Sanction	Right to appeal	Consultation with interested parties
	Telecom Package			
Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)	**Article 20 and 21**: The National Regulatory Authority (NRA) resolves the dispute related to regulatory framework for electronic communications networks and services. The NRA issues a binding decision in the shortest possible time frame and in any case within four months except in exceptional circumstances. Cross-border disputes are resolved by NRA concerned which coordinate their efforts in order to bring about a resolution of the dispute.		**Article 4**: "(...) *any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved*."	**Article 6**: A Consultation and transparency mechanism is established in order to give interested parties the opportunity to comment on measures which the NRA intends to take and which have a significant impact on the relevant market.
Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)		**Article 10**: Failure to comply with the general authorisation, rights of use or breach of specific obligations imposed on SMP operator may lead to administrative or financial penalties from the NRA, empowered to do so.		

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC, 2002/19/EC and 2002/20/EC (Framework Directive, Access Directive, Authorisation Directive)	In cross-border cases, NRA have the right to consult with BEREC (Body of European Regulators in electronic communications).	This directive enhances the power of sanction of the NRA by allowing it to impose dissuasive sanctions which may include financial penalties with ex post facto effect.	Member States collect information on the general subject matter of appeals and provide such information to the Commission and BEREC after a reasoned request from either.		
United States	**Authorisation and Licensing Agreements**				
	Authorisation and licensing System	Restriction on access	Technology neutral	Licences for cross-border routes	Rights of way
Dismantling of AT&T + Telecommunication Act of 1996	Since the dismantling of the telephone company AT&T in 1984, the Department of Justice has defined: – The licences of local loop operator – Local Exchange Carrier (LEC) – which offers services to the subscriber and the routing of calls between subscribers located in the same "LATA" areas. – The licences of long distance operator – Inter-Exchange Carrier (IXC) – which carries calls between subscribers located in distinct "LATA" areas. The 1996 Act abolished this licensing scheme (section 402 (b) (2) (A) in favour of a general authorization regime. This regime applies only to intra-states and inter states services. The provision of international services requires the granting of a license called "International Section 214 Authorization" or "International Licensing 214" (Report and Order In the Matters of Implementation of Section 402 (b) (2) (A) of the Telecommunications Act of 1996).				

Federal Land Policy and Management Act of 1976 ou State Act Land pour chaque Etat fédérés.					Granting of rights of way comes under federal, US competence (in case of Federally Owned Lands) or state competence (in case of state owned lands). In addition, there are trans-sectoral provisions requiring all network operators other than telecom to share passive infrastructure, poles, ducts, conduits or rights of way; Pursuant to Section 224 of the Communications Act, the Commission is authorized to regulate the rates, terms and conditions imposed by utilities on cable television systems or providers of telecommunications service that have attachments to the utilities' poles, ducts, conduits and rights-of-way, to assure that such rates, terms and conditions are just and reasonable, and to make certain that access to the utilities' poles, ducts, conduits and rights-of-way is provided in a non-discriminatory manner. The rules and regulations contained in sections 1.1401-1.1408 of the Commission's rules provide complaint and enforcement procedures to ensure that telecommunications carriers and cable system operators have nondiscriminatory access to utility poles, ducts, conduits, and that rights-of way on rates, terms and conditions are just and reasonable.

United States	**Specific authorisation regime for cable landing licences**
Cable Landing Licence Act of 1921 (U.S.C.Title 47--Telegraphs, Telephones, And Radiotelegraphs -- Chapter 2--Submarine Cables) + Title 47, Section 1.767 of the Code of Federal Regulations & Executive Order n° 10.530 *Federal Communication Commission. Cable Landing Licence. Joint Application for a License to Land and Operate a Submarine Cable Network Between the United States and Japan. Adopted: July 8, 1999 Released: July 9, 1999 File No. SCL-LIC-19981117-00025*	The Commission issues licences to own and operate submarine cables and associated cable landing stations located in the United States. It also authorizes modifications, and transfers or assignments of existing cable landing licenses. A cable landing license must be obtained prior to landing a submarine cable to connect: (1) the continental United States with any foreign country; (2) Alaska, Hawaii or the U.S. territories or possessions with a foreign country, the continental United States, or with each other; and (3) points within the continental United States, Alaska, Hawaii or a territory or possession in which the cable is laid in international waters. The following entities must apply for a cable landing licence: - an entity that owns or controls a cable landing station in the United States; and - all other entities owning or controlling a 5% or greater interest in the cable system and using the U.S. points of the cable system. The licensing regime imposes restrictions in terms of foreign ownership (see Title 47, Section 1.767 (k) of the Code of Federal Regulations) These licenses may be submitted "in the public interest" to specific conditions arising from the telecommunications regulation. However, the licences of this type that we have consult do not contain such specific obligations but they reserve the right to the FCC to impose them later.

Annex 2

United States	**Access**			
	Physical Access			Interconnection
	Network elements access including the unbundling	Collocation	Infrastructure sharing	
Résumé	In the U.S., the local telephone market was opened to competition by Telecommunications Act of 1996. The LEC (Local Exchange Carriers) are divided into two categories: • the ILEC (Incumbent LEC), already established at the date of effect of the law. • the CLEC (Competitive LEC), a new entrant in the local telephone market. To enable the establishment of effective competition, the ILECs generally have specific obligations. They should allow alternative operators to access regulated tariffs for existing networks: interconnection, unbundling, wholesale supply ... U.S. legislation has provided next that other competitors could also be regarded as ILEC (and therefore have the same obligations) when operators reach a market size comparable to that of ILEC, significantly replace the ILEC or when the public interest decide so.			
Telecommunication Act of 1996	**Section 251 (c) (3) et (4)**: The ILEC have obligation to provide unbundled access to local loop on non-discriminatory reasonable and fair conditions and rates.	The ILEC must also provide co-location services (annexed to access or interconnection) on fair and non discriminatory conditions and rates.	Section 259 of the Telecommunication Act related to the sharing of infrastructure provides that the FCC adopts rules in order to allow operators of all or part of universal service to access to shared infrastructure, technology or other resources of the local incumbent (however the shared resources should not be used to compete with the local operator history). To avoid potential anticompetitive effects of this sharing, the Commission refused to strictly define the resources to be shared supplanted by general recommendations to encourage the conclusion of agreements since the parties to those agreements were not direct competitors.	**Section 251(a)(1)**: Interconnection is an obligation imposed on all operators; it requires them to comply with a number of specifications and technical standards That obligation is reinforced for ILEC.

United States	**Access**
	Physical Access
	Physical network elements access, in particular the unbundling
FIRST REPORT AND ORDER. In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996. Adopted: August 1, 1996 (Local Competition Order)	Under **section 251 (d)(1)&(2)** and using an impairment standard, FCC specified 7 network elements which had to be unbundled: - local loops, - network interface devices, - local and tandem switching, - interoffice transmission facilities, - signalling networks and call related databases - operations support system - operator services and directory assistance. From this Order, 2 principal unbundling models emerged: - UNE-L unbundled network elements- leasing - UNE-P (unbundled Network Element Platform) This allowed CLECs to enter the market without any complementary facilities investments. .
REPORT AND ORDER In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers. Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (2004. Trennial Review Order)	The unbundling requirements on low frequencies (Offers UNE-L UNE-P +) are retained; the Order required that the current line sharing on high frequencies (broadband) be phased out over a three-year period. ILEC's obligations on the federal level about broadband are abolished. Operators deploying new networks of optical fibres are exempt from any requirement of unbundling. For those who deploy the fibre on the basis of their existing copper local loop or for cable operators, the unbundling requirement is maintained only on low frequencies.
ORDER in the matter of Unbundled Acces to Network Elements; Review of the Section 251Unbundling Obligations of Incubent Local Exchange Carriers (2005. Triennial Remander Order)	After the decision of D.C. District Court of Appeals, the Triennial Remand Order forbids the unbundling in some segments: mobile, long distance service. This banning of unbundling is motivated by the wish to encourage operators to invest. Access to the optical fibre is excluded from the unbundling requirement ..

Annex 2

United States	**Monopoly / Market Power**				
	Pricing obligations: pricing control and cost-oriented pricing	Non princing obligations			
		Transparency	Non-discrimination	Accounting separation	Retail/Wholesale Separation
Telecommunication Act of 1996	**Section 252(d)**: Pricing standards of interconnection and network element charges are based on the cost, non discriminatory, and may include a reasonable profit. Interconnection rates between local carriers and intra-state access charges (assessed on long-distance carriers) are regulated by the states. Interstate access charges are regulated by the FCC.		**Sections 251 c) §2&3**: Obligation of non-discrimination applies to interconnection and unbundled access.	-	**Section 272**: Separate affiliate is required for competitive activities.
	Essential facilities				
United States Code – Title 47	The essential facilities doctrine has been developed by the American courts on the basis of antitrust law (15 USC § 1 and 2, also known as the Sherman Act of July 2, 1890) which prohibits cartels and sanctions monopolistic behaviour. Over time, U.S. courts (in particular two decisions of the Supreme Court: U.S. vs. Terminal Railroad Association, 224 U.S. 383 (1912) – bridges railways, and MCI Communications Corp. vs. AT & T (1994) – National telecom network) draw the conditions which allow to compel a dominant company to share its essential facilities. These conditions are following: (1) The monopolist controls access to an essential facility; (2) The facility cannot be reasonably duplicated by a competitor; (3) The monopolist denies access to a competitor; and (4) It was feasible for the monopolist to grant access. However, in the Trinko case of 13 January 2004, the Supreme Court of the United States has challenged the essential facilities doctrine by judging that high prices of access was not sufficient to justify imposing access to essential infrastructure and above all, that there is a sectoral regulation that allows to compel actors to provide access on specified conditions (Theory of impeachment).				
United States	**Implementation**				
	Settlement of disputes				
Telecommunication Act of 1996	Pursuant to the **section 252 b)** a party to a negotiation may petition a state PSC (Public Service Commission) to arbitrate any open issues. If the state PSC fails to act, the FCC steps in to mediate or arbitrate the dispute.				

Annex 2

	Other countries that regulated and / or have a specific practice in the field of submarine cables (the examples below are detailed in the executive summary attached)
India	Exercising its powers of price regulation, TRAI fixed a ceiling tariff for IPLC, for the three most commonly used capacities i.e. E-1, DS-3 and STM-1. Then, in 2007 TRAI completed this matter by giving recommendations on terms & conditions for the introduction of Resale in IPLC segment. Finally, in June 2007, TRAI issued the Regulation on International Telecommunication Access to Essential Facilities at Cable Landing Station.
Singapore	Subsection 5.3.1. of the Code of Practice for Competition in the Provision of Telecommunication services requires the dominant licensee to submit RIO for Authority's approval. Pursuant to its powers the NRA of Singapore – Infocomm Development Authority (IDA) – modified the SinTel's RIO by inserting specific measures related to cable landing stations.
Mauritius	The NRA of Mauritius (Information & Communication Technologies Authority) relied on its powers to regulate interconnection in order to regulate IPLC rates of the incumbent operator – Mauritius Telecom. In 2006, the ICTA determined the IPLC tariffs of four-lane connecting Mauritius with Portugal, South Africa, India and Malaysia. The new tariffs include access to the local loop and backhaul.

Annex 3

Annex 3: International set of articles mentioned in the Matrix

WORLD TRADE ORGANISATION

General Agreement on Trade in Services

Article XX

Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

(a) terms, limitations and conditions on market access;

(b) conditions and qualifications on national treatment;

(c) undertakings relating to additional commitments;

(d) where appropriate the time-frame for implementation of such commitments; and

(e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

Annex on Telecommunications

4. *Transparency*

In the application of Article III of the Agreement, each Member shall ensure that relevant information on conditions affecting access to and use of public telecommunications transport networks and services is publicly available, including: tariffs and other terms and conditions of service; specifications of technical interfaces with such networks and services; information on bodies responsible for the preparation and adoption of standards affecting such access and use; conditions applying to attachment of terminal or other equipment; and notifications, registration or licensing requirements, if any.

5. *Access to and use of Public Telecommunications Transport Networks and Services*

(a) Each Member shall ensure that any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions, for the supply of a service included in its Schedule. This obligation shall be applied, inter alia, through paragraphs (b) through (f).[46]

(b) Each Member shall ensure that service suppliers of any other Member have access to and use of any public telecommunications transport network or service offered within or across the border of that Member, including private leased circuits, and to this end shall ensure, subject to paragraphs (e) and (f), that such suppliers are permitted:

(i) to purchase or lease and attach terminal or other equipment which interfaces with the network and which is necessary to supply a supplier's services;

(ii) to interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier; and

(iii) to use operating protocols of the service supplier's choice in the supply of any service, other than as necessary to ensure the availability of telecommunications transport networks and services to the public generally.

(c) Each Member shall ensure that service suppliers of any other Member may use public telecommunications transport networks and services for the movement of information within and across borders, including for intra-corporate communications of such service suppliers, and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member. Any new or amended measures of a Member significantly affecting such use shall be notified and shall be subject to consultation, in accordance with relevant provisions of the Agreement.

(d) Notwithstanding the preceding paragraph, a Member may take such measures as are necessary to ensure the security and confidentiality of messages, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on trade in services.

(e) Each Member shall ensure that no condition is imposed on access to and use of public telecommunications transport networks and services other than as necessary:

(i) to safeguard the public service responsibilities of suppliers of public telecommunications transport networks and services, in particular their ability to make their networks or services available to the public generally;

(ii) to protect the technical integrity of public telecommunications transport networks or services; or

(iii) to ensure that service suppliers of any other Member do not supply services unless permitted pursuant to commitments in the Member's Schedule.

(f) Provided that they satisfy the criteria set out in paragraph (e), conditions for access to and use of public telecommunications transport networks and services may include:

(i) restrictions on resale or shared use of such services;

(ii) a requirement to use specified technical interfaces, including interface protocols, for inter-connection with such networks and services;

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[46] The term "non-discriminatory" is understood to refer to most-favoured-nation and national treatment as defined in the Agreement, as well as to reflect sector-specific usage of the term to mean "terms and conditions no less favourable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances".

(iii) requirements, where necessary, for the inter-operability of such services and to encourage the achievement of the goals set out in paragraph 7(a);

(iv) type approval of terminal or other equipment which interfaces with the network and technical requirements relating to the attachment of such equipment to such networks;

(v) restrictions on inter-connection of private leased or owned circuits with such networks or services or with circuits leased or owned by another service supplier; or

(vi) notification, registration and licensing.

(g) Notwithstanding the preceding paragraphs of this section, a developing country Member may, consistent with its level of development, place reasonable conditions on access to and use of public telecommunications transport networks and services necessary to strengthen its domestic telecommunications infrastructure and service capacity and to increase its participation in international trade in telecommunications services. Such conditions shall be specified in the Member's Schedule.

Telecommunications Services: Reference Paper. Negotiating Group on basic telecommunications. 24 April 1996

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) at any time or

(b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

4. Public availability of licensing criteria

Where a licence is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and

(b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

EUROPEAN UNION

Council Directive 90/387/EEC of 28 June 1990 on the establishment of the internal market for telecommunications services through the implementation of open network provision

Article 3

1. Open network provision conditions must comply with a number of basic principles set out hereafter, namely that:

- they must be based on objective criteria,
- they must be transparent and published in an appropriate manner,
- they must guarantee equality of access and must be non-discriminatory, in accordance with Community law.

2. Open network provision conditions must not restrict access to public telecommunications networks or public telecommunications services, except for reasons based on essential requirements, within the framework of Community law, namely:

- security of network operations,
- maintenance of network integrity,
- interoperability of services, in justified cases,
- protection of data, as appropriate.

In addition, the conditions generally applicable to the connection of terminal equipment to the network shall apply.

3. Open network provision conditions may not allowfor any additional restrictions on the use of the public telecommunications networks and/or public telecommunications services except the restrictions which may be derived from the exercise of special or exclusive rights granted by Member States and which are compatible with Community law.

4. The Council, acting in accordance with Article 100a of the Treaty, may, if necessary, modify the points set out in paragraphs 1 and 2.

5. Without prejudice to the specific Directives provided for in Article 6 and in so far as the application of the essential requirements referred to in paragraph 2 of this Article may cause a Member State to limit access to one of its public telecommunications networks or services, the rules for uniform application of the essential requirements, in particular concerning the interoperability of services and the protection of data, shall be determined, where appropriate, by the Commission, in accordance with the procedure laid down in Article 10.

ANNEX II

Reference framework for drawing up proposals on open network provision conditions in accordance with Article 4 (4) (d) Proposals on open network provision conditions as defined in Article 2 (10) should be drawn up in accordance with the following reference framework:

Annex 3

1. Common principles

In drawing up the conditions described in this Annex, due account will be taken of the relevant rules of the Treaty.

Open network provision conditions shall be drawn up in such a way as to facilitate the service providers' and users' freedom of action without unduly limiting the telecommunications organizations' responsibility for the functioning of the network and the best possible condition of communications channels.

Member States may, in accordance with Community law, take any measure enabling the telecommunications organizations to develop the new opportunities deriving from open network provision.

2. Harmonized technical interfaces and/or service features

In drawing up open network provision conditions the following scheme should be taken into account for the definition of technical interfaces at appropriate open network termination points:

- for existing services and networks, existing interfaces should be adopted;
- for entirely new services or the improvement of existing services, existing interfaces should also be adopted, as far as feasible. When existing interfaces are not suitable, enhancements and/or new interfaces will have to be specified;
- for networks that are still to be introduced, but for which the standardization programme has already commenced, open network provision requirements falling within the terms of Article 3 should be taken into account when specifying new interfaces.

Open network provision proposals must, wherever possible, be in line with the ongoing work in the European Conference of Postal and Telecommunications Administrations (CEPT), CCITT, ETSI and CEN-Cenelec.

Work undertaken in this area shall take full account of the framework resulting from the provisions of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations (;), as last amended by Directive 88/182/EEC ($), Council Directive 86/361/EEC of 24 July 1986 on the initial stage of the mutual recognition of type approval for telecommunications terminal equipment (=) and Council Decision 87/95/EEC of 22 December 1986 on standardization in the field of information technology and telecommunications (%).

Additional features will be identified where required. They may be classified as:

- inclusive if they are provided in association with a specific interface and included in the standard offering,
- optional if they can be requested as an option with regard to a specific open network provision offering.

Work shall include the drawing up of proposals for time schedules for the introduction of interfaces and service features, taking account of the state of development of telecommunications networks and services in the Community.

3. Harmonized supply and usage conditions

Supply and usage conditions shall identify conditions of access and of provision of services, as far as required.

They may include as applicable:

(a) supply conditions such as:

- maximum provision time (delivery period),
- quality of service, in particular the quality of transmission,
- maintenance,
- network malfunction reporting facilities;

(;) OJ No L 109, 26. 4. 1983, p. 8.

($) OJ No L 81, 26. 3. 1988, p. 75.

(=) OJ No L 217, 5. 8. 1986, p. 21.

(%) OJ No L 36, 7. 2. 1987, p. 31.

(b) usage conditions such as:

- conditions for resale of capacity,
- conditions for shared use,
- conditions for interconnection with public and private networks.

Usage conditions may include conditions regarding access to frequencies, as applicable, and measures concerning protection of personal data and confidentiality of communications, where required.

Harmonized tariff principles

Tariff principles must be consistent with the principles set out in Article 3 (1).

These principles imply, in particular, that:

- tariffs must be based on objective criteria and especially in the case of services and areas subject to special or exclusive rights must in principle be cost-oriented, on the understanding that the fixing of the actual tariff level will continue to be the province of national legislation and is not the subject of open network provision conditions. When these tariffs are determined, one of the aims should be the definition of efficient tariff principles throughout the Community while ensuring a general service for all,
- tariffs must be transparent and must be properly published,
- in order to leave users a choice between the individual service elements and where technology so permits, tariffs must be sufficiently unbundled in accordance with the competition rules of the Treaty. In particular, additional features introduced to provide certain specific extra services must, as a general rule, be charged independently of the inclusive features and transportation as such,
- tariffs must be non-discriminatory and guarantee equality of treatment.

Any charge for access to network resources or services must comply with the principles set out above and with the competition rules of the Treaty and must also take into account the principle of fair sharing in the global cost of the resources used and the need for a reasonable level of return on investment.

There may be different tariffs, in particular to take account of excess traffic during peak periods and lack of traffic during off-periods, provided that the tariff differentials are commercially justifiable and do not conflict with the above principles.

Annex 3

Commission Directive 90/388/EEC of 28 June 1990 on competition in the markets for telecommunications services

Article 2

Without prejudice to Article 1 (2), Member States shall withdraw all special or exclusive rights for the supply of telecommunications services other than voice telephony and shall take the measures necessary to ensure that any operator is entitled to supply such telecommunications services.

Member States which make the supply of such services subject to a licensing or declaration procedure aimed at compliance with the essential requirements shall ensure that the conditions for the grant of licences are objective, non-discriminatory and transparent, that reasons are given for any refusal, and that there is a procedure for appealing against any such refusal.

Without prejudice to Article 3, Member States shall inform the Commission no later than 31 December 1990 of the measures taken to comply with this Article and shall inform it of any existing regulations or of plans to introduce new licensing procedures or to change existing procedures.

Article 4

Member States which maintain special or exclusive rights for the provision and operation of public telecommunications networks shall take the necessary measures to make the conditions governing access to the networks objective and non-discriminatory and publish them.

In particular, they shall ensure that operators who so request can obtain leased lines within a reasonable period, that there are no restrictions on their use other than those justified in accordance with Article 2.

Member States shall inform the Commission no later than 31 December 1990 of the steps they have taken to comply with this Article.

Each time the charges for leased lines are increased, Member States shall provide information to the Commission on the factors justifying such increases.

Article 5

Without prejudice to the relevant international agreements, Member States shall ensure that the characteristics of the technical interfaces necessary for the use of public networks are published by 31 December 1990 at the latest.

Member States shall communicate to the Commission, in accordance with Directive 83/189/EEC, any draft measure drawn up for this purpose.

Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorizations and individual licences in the field of telecommunications services

Article 4

Conditions attached to general authorizations

1. Where Member States subject the provision of telecommunications services to general authorizations, the conditions which, where justified, may be attached to such authorizations are set out in points 2 and 3 of the Annex. Such authorizations shall entail the least onerous system possible consistent with enforcing

the relevant essential requirements and relevant other public interest requirements set out in points 2 and 3 of the Annex.

2. Member States shall ensure that the conditions attached to general authorizations are published in an appropriate manner so as to provide easy access to that information for interested parties. Reference to the publication of this information shall be made in the national official gazette of the Member State concerned and in the Official Journal of the European Communities.

3. Member States may amend the conditions attached to a general authorization in objectively justified cases and in a proportionate manner. When doing so, Member States shall give appropriate notice of their intention to do so and enable interested parties to express their views on the proposed amendments.

INDIVIDUAL LICENCES

Article 7

Scope

1. Member States may issue individual licences for the following purposes only:

(a) to allow the licensee access to radio frequencies or numbers;

(b) to give the licensee particular rights with regard to access to public or private land;

(c) to impose obligations and requirements on the licensee relating to the mandatory provision of publicly available telecommunications services and/or public telecommunications networks, including obligations which require the licensee to provide universal service and other obligations under ONP legislation;

(d) to impose specific obligations, in accordance with Community competition rules, where the licensee has significant market power, as defined in Article 4 (3) of the Interconnection Directive in relation to the provision of public telecommunications networks and publicly available telecommunications services.

2. Notwithstanding paragraph 1, the provision of publicly available voice telephony services, the establishment and provision of public telecommunications networks as well as other networks involving the use of radio frequencies may be subject to individual licences.

Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997 on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision (ONP)

Article 3

Interconnection at national and Community level

1. Member States shall take all necessary measures to remove any restrictions which prevent organizations authorized by Member States to provide public telecommunications networks and publicly available telecommunications services from negotiating interconnection agreements between themselves in accordance with Community law. The organizations concerned may be in the same Member State or in different Member States. Technical and commercial arrangements for interconnection shall be a matter for agreement between the parties involved, subject to the provisions of this Directive and the competition rules of the Treaty.

2. Member States shall ensure the adequate and efficient interconnection of the public telecommunications networks set out in Annex I, to the extent necessary to ensure interoperability of these services for all users within the Community.

3. Member States shall ensure that organizations which interconnect their facilities to public telecommunications networks and/or publicly available telecommunications services respect at all times the confidentiality of information transmitted or stored.

Article 4

Rights and obligations for interconnection

1. Organizations authorized to provide public telecommunications networks and/or publicly available telecommunications services as set out in Annex II shall have a right and, when requested by organizations in that category, an obligation to negotiate interconnection with each other for the purpose of providing the services in question, in order to ensure provision of these networks and services throughout the Community. On a case-by-case basis, the national regulatory authority may agree to limit this obligation on a temporary basis and on the grounds that there are technically and commercially viable alternatives to the interconnection requested, and that the requested interconnection is inappropriate in relation to the resources available to meet the request. Any such limitation imposed by a national regulatory authority shall be fully reasoned and made public in accordance with Article 14 (2).

2. Organizations authorized to provide public telecommunications networks and publicly available telecommunications services as set out in Annex I which have significant market power shall meet all reasonable requests for access to the network including access at points other than the network termination points offered to the majority of end-users.

3. An organization shall be presumed to have significant market power when it has a share of more than 25 % of a particular telecommunications market in the geographical area in a Member State within which it is authorized to operate.

National regulatory authorities may nevertheless determine that an organization with a market share of less than 25 % in the relevant market has significant market power. They may also determine that an organization with a market share of more than 25 % in the relevant market does not have significant market power. In either case, the determination shall take into account the organization's ability to influence market conditions, its turnover relative to the size of the market, its control of the means of access to end-users, its access to financial resources and its experience in providing products and services in the market.

Article 9

General responsibilities of the national regulatory authorities

1. National regulatory authorities shall encourage and secure adequate interconnection in the interests of all users, exercising their responsibility in a way that provides maximum economic efficiency and gives the maximum benefit to end-users. In particular, national regulatory authorities shall take into account:

- the need to ensure satisfactory end-to-end communications for users,
- the need to stimulate a competitive market,
- the need to ensure the fair and proper development of a harmonized European telecommunication market,
- the need to cooperate with their counterparts in other Member States,

- the need to promote the establishment and development of trans-European networks and services, and the interconnection of national networks and interoperability of services, as well as access to such networks and services,
- the principles of non-discrimination (including equal access) and proportionality,
- the need to maintain and develop universal service.

2. General conditions set down in advance by the national regulatory authority shall be published in accordance with Article 14 (1).

In particular, in relation to interconnection between organizations set out in Annex II, national regulatory authorities:

- may set ex ante conditions in the areas listed in Part 1 of Annex VII;
- shall encourage coverage in interconnection agreements of the issues listed in Part 2 of Annex VII.

3. In pursuit of the aims stated in paragraph 1, national regulatory authorities may intervene on their own initiative at any time, and shall do so if requested by either party, in order to specify issues which must be covered in an interconnection agreement, or to lay down specific conditions to be observed by one or more parties to such an agreement. National regulatory authorities may, in exceptional cases, require changes to be made to interconnection agreements already concluded, where justified to ensure effective competition and/or interoperability of services for users.

Conditions set by the national regulatory authority may include inter alia conditions designed to ensure effective competition, technical conditions, tariffs, supply and usage conditions, conditions as to compliance with relevant standards, compliance with essential requirements, protection of the environment, and/or the maintenance of end-to-end quality of service.

The national regulatory authority may, on its own initiative at any time or if requested by either party, also set time limits within which negotiations on interconnection are to be completed. If agreement is not reached within the time allowed, the national regulatory authority shall take steps to bring about an agreement under procedures laid down by that authority. The procedures shall be open to the public in accordance with Article 14 (2).

4. Where an organization authorized to provide public telecommunications networks or publicly available telecommunications services enters into interconnection agreements with others, the national regulatory authority shall have the right to inspect all such interconnection agreements in their entirety.

5. In the event of an interconnection dispute between organizations in a Member State, the national regulatory authority of that Member State shall, at the request of either party, take steps to resolve the dispute within six months of this request. The resolution of the dispute shall represent a fair balance between the legitimate interests of both parties.

In so doing, the national regulatory authority shall take into account, inter alia:

- the user interest,
- regulatory obligations or constraints imposed on any of the parties,
- the desirability of stimulating innovative market offerings, and of providing users with a wide range of telecommunications services at a national and at a Community level,
- the availability of technically and commercially viable alternatives to the interconnection requested,
- the desirability of ensuring equal access arrangements,

- the need to maintain the integrity of the public telecommunications network and the interoperability of services,
- the nature of the request in relation to the resources available to meet the request,
- the relative market positions of the parties,
- the public interest (e.g. the protection of the environment),
- the promotion of competition,
- the need to maintain a universal service.

A decision on the matter by a national regulatory authority shall be made available to the public in accordance with national procedures. The parties concerned shall be given a full statement of the reasons on which it is based.

6. In cases where organizations which are authorized to provide public telecommunications networks and/or publicly available telecommunications services have not interconnected their facilities, national regulatory authorities, in compliance with the principle of proportionality and in the interest of users, shall be able, as a last resort, to require the organizations concerned to interconnect their facilities in order to protect essential public interests and, where appropriate, shall be able to set terms of interconnection.

ANNEX I

SPECIFIC PUBLIC TELECOMMUNICATIONS NETWORKS AND PUBLICLY AVAILABLE TELECOMMUNICATIONS SERVICES

(referred to in Article 3 (2))

The following public telecommunications networks and publicly available telecommunications services are considered of major importance at European level.

Organizations providing the public telecommunications networks and/or publicly available services identified below which have significant market power are subject to specific obligations with regard to interconnection and access, as specified in Articles 4 (2), 6 and 7.

Part 1

The fixed public telephone network

The fixed public telephone network means the public switched telecommunications network which supports the transfer between network termination points at fixed locations of speech and 3,1 kHz bandwidth audio information, to support inter alia:

- voice telephony,
- facsimile Group III communications, in accordance with ITU-T Recommendations in the 'T-series`,
- voice band data transmission via modems at a rate of at least 2 400 bit/s, in accordance with ITU-T Recommendations in the 'V-series`.

Access to the end-user's network termination point is via a number or numbers in the national numbering plan.

The fixed public telephone service according to Directive 95/62/EC of the European Parliament and of the Council of 13 December 1995 on the application of open network provision (ONP) to voice telephony (1).

The fixed public telephone service means the provision to end-users at fixed locations of a service for the originating and receiving of national and international calls, and may include access to emergency (112) services, the provision of operator assistance, directory services, provision of public pay phones, provision of service under special terms and/or provision of special facilities for customers with disabilities or with special social needs.

Access to the end-user is via a number or numbers in the national numbering plan.

Part 2

The leased lines service

Leased lines means the telecommunications facilities which provide for transparent transmission capacity between network termination points, and which do not include on-demand switching (switching functions which the user can control as part of the leased line provision). They may include systems which allow flexible use of the leased line bandwidth, including certain routing and management capabilities.

Part 3

Public mobile telephone networks

A public mobile telephony network is a public telephone network where the network termination points are not at fixed locations.

Public mobile telephone services

A public mobile telephone service is a telephony service whose provision consists, wholly or partly, in the establishment of radiocommunications to one mobile user, and makes use wholly or partly of a public mobile telephone network.

(1) OJ No L 321, 30. 12. 1995, p. 6.

Communication from the Commission on the application of the competition rules to access agreements in the telecommunications sector – framework, relevants markets and principles. OJ C 76, 11.3.1997

59. In the telecommunications sector, the concept of 'essential facilities` will in many cases be of direct relevance in determining the duties of dominant telecommunications operators. The phrase essential facility is used to describe a facility or infrastructure which is essential for reaching customers and/or enabling competitors to carry on their business, and which cannot be replicated by any reasonable means (50).

Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive)

Article 6

Conditions attached to the general authorisation and to the rights of use for radio frequencies and for numbers, and specific obligations

1. The general authorisation for the provision of electronic communications networks or services and the rights of use for radio frequencies and rights of use for numbers may be subject only to the conditions listed respectively in parts A, B and C of the Annex. Such conditions shall be objectively justified in relation to the network or service concerned, non-discriminatory, proportionate and transparent.

2. Specific obligations which may be imposed on providers of electronic communications networks and services under Articles 5(1), 5(2), 6 and 8 of Directive 2002/19/EC (Access Directive) and Articles 16, 17, 18 and 19 of Directive 2002/22/EC (Universal Service Directive) or on those designated to provide universal service under the said Directive shall be legally separate from the rights and obligations under the general authorisation. In order to achieve transparency for undertakings, the criteria and procedures for imposing such specific obligations on individual undertakings shall be referred to in the general authorisation.

3. The general authorisation shall only contain conditions which are specific for that sector and are set out in Part A of the Annex and shall not duplicate conditions which are applicable to undertakings by virtue of other national legislation.

4. Member States shall not duplicate the conditions of the general authorisation where they grant the right of use for radio frequencies or numbers.

Article 10

Compliance with the conditions of the general authorisation or of rights of use and with specific obligations

1. National regulatory authorities may require undertakings providing electronic communications networks or services covered by the general authorisation or enjoying rights of use for radio frequencies or numbers to provide information necessary to verify compliance with the conditions of the general authorisation or of rights of use or with the specific obligations referred to in Article 6(2), in accordance with Article 11.

2. Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation, or of rights of use or with the specific obligations referred to in Article 6(2), it shall notify the undertaking of those findings and give the undertaking a reasonable opportunity to state its views or remedy any breaches within:

- one month after notification, or
- a shorter period agreed by the undertaking or stipulated by the national regulatory authority in case of repeated breaches, or
- a longer period decided by the national regulatory authority.

3. If the undertaking concerned does not remedy the breaches within the period as referred to in paragraph 2, the relevant authority shall take appropriate and proportionate measures aimed at ensuring compliance. In this regard, Member States may empower the relevant authorities to impose financial penalties where appropriate. The measures and the reasons on which they are based shall be communicated to the undertaking concerned within one week of their adoption and shall stipulate a reasonable period for the undertaking to comply with the measure.

4. Notwithstanding the provisions of paragraphs 2 and 3, Member States may empower the relevant authority to impose financial penalties where appropriate on undertakings for failure to provide information in accordance with obligations imposed under Article 11(1)(a) or (b) of this Directive or Article 9 of Directive 2002/19/EC (Access Directive) within a reasonable period stipulated by the national regulatory authority.

5. In cases of serious and repeated breaches of the conditions of the general authorisation, the rights of use or specific obligations referred to in Article 6(2), where measures aimed at ensuring compliance as referred to in paragraph 3 of this Article have failed, national regulatory authorities may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use.

6. Irrespective of the provisions of paragraphs 2, 3 and 5, where the relevant authority has evidence of a breach of the conditions of the general authorisation, rights of use or specific obligations referred to in Article 6(2) that represents an immediate and serious threat to public safety, public security or public health or will create serious economic or operational problems for other providers or users of electronic communications networks or services, it may take urgent interim measures to remedy the situation in advance of reaching a final decision. The undertaking concerned shall thereafter be given a reasonable opportunity to state its view and propose any remedies. Where appropriate, the relevant authority may confirm the interim measures.

7. Undertakings shall have the right to appeal against measures taken under this Article in accordance with the procedure referred to in Article 4 of Directive 2002/21/EC (Framework Directive).

Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive)

Article 3

General framework for access and interconnection

1. Member States shall ensure that there are no restrictions which prevent undertakings in the same Member State or in different Member States from negotiating between themselves agreements on technical and commercial arrangements for access and/or interconnection, in accordance with Community law. The undertaking requesting access or interconnection does not need to be authorised to operate in the Member State where access or interconnection is requested, if it is not providing services and does not operate a network in that Member State.

2. Without prejudice to Article 31 of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)(16), Member States shall not maintain legal or administrative measures which oblige operators, when granting access or interconnection, to offer different terms and conditions to different undertakings for equivalent services and/or imposing obligations that are not related to the actual access and interconnection services provided without prejudice to the conditions fixed in the Annex of Directive 2002/20/EC (Authorisation Directive).

Article 4

Rights and obligations for undertakings

1. Operators of public communications networks shall have a right and, when requested by other undertakings so authorised, an obligation to negotiate interconnection with each other for the purpose of providing publicly available electronic communications services, in order to ensure provision and interoperability of services throughout the Community. Operators shall offer access and interconnection to other undertakings on terms and conditions consistent with obligations imposed by the national regulatory authority pursuant to Articles 5, 6, 7 and 8.

2. Public electronic communications networks established for the distribution of digital television services shall be capable of distributing wide-screen television services and programmes. Network operators that receive and redistribute wide-screen television services or programmes shall maintain that wide-screen format.

3. Without prejudice to Article 11 of Directive 2002/20/EC (Authorisation Directive), Member States shall require that undertakings which acquire information from another undertaking before, during or after the process of negotiating access or interconnection arrangements use that information solely for the purpose for which it was supplied and respect at all times the confidentiality of information transmitted or stored. The received information shall not be passed on to any other party, in particular other departments, subsidiaries or partners, for whom such information could provide a competitive advantage.

Article 9

Obligation of transparency

1. National regulatory authorities may, in accordance with the provisions of Article 8, impose obligations for transparency in relation to interconnection and/or access, requiring operators to make public specified information, such as accounting information, technical specifications, network characteristics, terms and conditions for supply and use, and prices.

2. In particular where an operator has obligations of non-discrimination, national regulatory authorities may require that operator to publish a reference offer, which shall be sufficiently unbundled to ensure that undertakings are not required to pay for facilities which are not necessary for the service requested, giving a description of the relevant offerings broken down into components according to market needs, and the associated terms and conditions including prices. The national regulatory authority shall, inter alia, be able to impose changes to reference offers to give effect to obligations imposed under this Directive.

3. National regulatory authorities may specify the precise information to be made available, the level of detail required and the manner of publication.

4. Notwithstanding paragraph 3, where an operator has obligations under Article 12 concerning unbundled access to the twisted metallic pair local loop, national regulatory authorities shall ensure the publication of a reference offer containing at least the elements set out in Annex II.

5. In the light of market and technological developments, Annex II may be amended in accordance with the procedure referred to in Article 14(3).

Article 10

Obligation of non-discrimination

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations of non-discrimination, in relation to interconnection and/or access.

2. Obligations of non-discrimination shall ensure, in particular, that the operator applies equivalent conditions in equivalent circumstances to other undertakings providing equivalent services, and provides services and information to others under the same conditions and of the same quality as it provides for its own services, or those of it subsidiaries or partners.

Article 11

Obligation of accounting separation

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations for accounting separation in relation to specified activities related to interconnection and/or access.

In particular, a national regulatory authority may require a vertically integrated company to make transparent its wholesale prices and its internal transfer prices inter alia to ensure compliance where there is a requirement for non-discrimination under Article 10 or, where necessary, to prevent unfair cross-subsidy. National regulatory authorities may specify the format and accounting methodology to be used.

2. Without prejudice to Article 5 of Directive 2002/21/EC (Framework Directive), to facilitate the verification of compliance with obligations of transparency and non-discrimination, national regulatory authorities shall have the power to require that accounting records, including data on revenues received from third parties, are provided on request. National regulatory authorities may publish such information as would contribute to an open and competitive market, while respecting national and Community rules on commercial confidentiality.

Article 12

Obligations of access to, and use of, specific network facilities

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations on operators to meet reasonable requests for access to, and use of, specific network elements and associated facilities, inter alia in situations where the national regulatory authority considers that denial of access or unreasonable terms and conditions having a similar effect would hinder the emergence of a sustainable competitive market at the retail level, or would not be in the end-user's interest.

Operators may be required inter alia:

(a) to give third parties access to specified network elements and/or facilities, including unbundled access to the local loop;

(b) to negotiate in good faith with undertakings requesting access;

(c) not to withdraw access to facilities already granted;

(d) to provide specified services on a wholesale basis for resale by third parties;

(e) to grant open access to technical interfaces, protocols or other key technologies that are indispensable for the interoperability of services or virtual network services;

(f) to provide co-location or other forms of facility sharing, including duct, building or mast sharing;

(g) to provide specified services needed to ensure interoperability of end-to-end services to users, including facilities for intelligent network services or roaming on mobile networks;

(h) to provide access to operational support systems or similar software systems necessaryto ensure fair competition in the provision of services;

(i) to interconnect networks or network facilities.

National regulatory authorities may attach to those obligations conditions covering fairness, reasonableness and timeliness.

2. When national regulatory authorities are considering whether to impose the obligations referred in paragraph 1, and in particular when assessing whether such obligations would be proportionate to the

objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), they shall take account in particular of the following factors:

(a) the technical and economic viability of using or installing competing facilities, in the light of the rate of market development, taking into account the nature and type of interconnection and access involved;

(b) the feasibility of providing the access proposed, in relation to the capacity available;

(c) the initial investment by the facility owner, bearing in mind the risks involved in making the investment;

(d) the need to safeguard competition in the long term;

(e) where appropriate, any relevant intellectual property rights;

(f) the provision of pan-European services.

Article 13

Price control and cost accounting obligations

1. A national regulatory authority may, in accordance with the provisions of Article 8, impose obligations relating to cost recovery and price controls, including obligations for cost orientation of prices and obligations concerning cost accounting systems, for the provision of specific types of interconnection and/or access, in situations where a market analysis indicates that a lack of effective competition means that the operator concerned might sustain prices at an excessively high level, or apply a price squeeze, to the detriment of end-users. National regulatory authorities shall take into account the investment made by the operator and allow him a reasonable rate of return on adequate capital employed, taking into account the risks involved.

2. National regulatory authorities shall ensure that any cost recovery mechanism or pricing methodology that is mandated serves to promote efficiency and sustainable competition and maximise consumer benefits. In this regard national regulatory authorities may also take account of prices available in comparable competitive markets.

3. Where an operator has an obligation regarding the cost orientation of its prices, the burden of proof that charges are derived from costs including a reasonable rate of return on investment shall lie with the operator concerned. For the purpose of calculating the cost of efficient provision of services, national regulatory authorities may use cost accounting methods independent of those used by the undertaking. National regulatory authorities may require an operator to provide full justification for its prices, and may, where appropriate, require prices to be adjusted.

4. National regulatory authorities shall ensure that, where implementation of a cost accounting system is mandated in order to support price controls, a description of the cost accounting system is made publicly available, showing at least the main categories under which costs are grouped and the rules used for the allocation of costs. Compliance with the cost accounting system shall be verified by a qualified independent body. A statement concerning compliance shall be published annually.

Annex 3

Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)

Article 4

Right of appeal

1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.

2. Where the appeal body referred to in paragraph 1 is not judicial in character, written reasons for its decision shall always be given. Furthermore, in such a case, its decision shall be subject to review by a court or tribunal within the meaning of Article 234 of the Treaty.

Article 6

Consultation and transparency mechanism

Except in cases falling within Articles 7(6), 20 or 21 Member States shall ensure that where national regulatory authorities intend to take measures in accordance with this Directive or the Specific Directives which have a significant impact on the relevant market, they give interested parties the opportunity to comment on the draft measure within a reasonable period. National regulatory authorities shall publish their national consultation procedures. Member States shall ensure the establishment of a single information point through which all current consultations can be accessed. The results of the consultation procedure shall be made publicly available by the national regulatory authority, except in the case of confidential information in accordance with Community and national law on business confidentiality.

Article 8

Policy objectives and regulatory principles

1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, in particular those designed to ensure effective competition, national regulatory authorities take the utmost account of the desirability of making regulations technologically neutral.

National regulatory authorities may contribute within their competencies to ensuring the implementation of policies aimed at the promotion of cultural and linguistic diversity, as well as media pluralism.

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

(a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality;

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

(c) encouraging efficient investment in infrastructure, and promoting innovation; and

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

3. The national regulatory authorities shall contribute to the development of the internal market by inter alia:

(a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;

(b) encouraging the establishment and development of trans-European networks and the interoperability of pan-European services, and end-to-end connectivity;

(c) ensuring that, in similar circumstances, there is no discrimination in the treatment of undertakings providing electronic communications networks and services;

(d) cooperating with each other and with the Commission in a transparent manner to ensure the development of consistent regulatory practice and the consistent application of this Directive and the Specific Directives.

4. The national regulatory authorities shall promote the interests of the citizens of the European Union by inter alia:

(a) ensuring all citizens have access to a universal service specified in Directive 2002/22/EC (Universal Service Directive);

(b) ensuring a high level of protection for consumers in their dealings with suppliers, in particular by ensuring the availability of simple and inexpensive dispute resolution procedures carried out by a body that is independent of the parties involved;

(c) contributing to ensuring a high level of protection of personal data and privacy;

(d) promoting the provision of clear information, in particular requiring transparency of tariffs and conditions for using publicly available electronic communications services;

(e) addressing the needs of specific social groups, in particular disabled users; and

(f) ensuring that the integrity and security of public communications networks are maintained.

Article 11

Rights of way

1. Member States shall ensure that when a competent authority considers:

- an application for the granting of rights to install facilities on, over or under public or private property to an undertaking authorised to provide public communications networks, or
- an application for the granting of rights to install facilities on, over or under public property to an undertaking authorised to provide electronic communications networks other than to the public,

the competent authority:

- acts on the basis of transparent and publicly available procedures, applied without discrimination and without delay, and

- follows the principles of transparency and non-discrimination in attaching conditions to any such rights.

The abovementioned procedures can differ depending on whether the applicant is providing public communications networks or not.

2. Member States shall ensure that where public or local authorities retain ownership or control of undertakings operating electronic communications networks and/or services, there is effective structural separation of the function responsible for granting the rights referred to in paragraph 1 from activities associated with ownership or control.

3. Member States shall ensure that effective mechanisms exist to allow undertakings to appeal against decisions on the granting of rights to install facilities to a body that is independent of the parties involved.

Article 12

Co-location and facility sharing

1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall encourage the sharing of such facilities or property.

2. In particular where undertakings are deprived of access to viable alternatives because of the need to protect the environment, public health, public security or to meet town and country planning objectives, Member States may impose the sharing of facilities or property (including physical co-location) on an undertaking operating an electronic communications network or take measures to facilitate the coordination of public works only after an appropriate period of public consultation during which all interested parties must be given an opportunity to express their views. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing.

Article 13

Accounting separation and financial reports

1. Member States shall require undertakings providing public communications networks or publicly available electronic communications services which have special or exclusive rights for the provision of services in other sectors in the same or another Member State to:

(a) keep separate accounts for the activities associated with the provision of electronic communications networks or services, to the extent that would be required if these activities were carried out by legally independent companies, so as to identify all elements of cost and revenue, with the basis of their calculation and the detailed attribution methods used, related to their activities associated with the provision of electronic communications networks or services including an itemised breakdown of fixed asset and structural costs, or

(b) have structural separation for the activities associated with the provision of electronic communications networks or services.

Member States may choose not to apply the requirements referred to in the first subparagraph to undertakings the annual turnover of which in activities associated with electronic communications networks or services in the Member States is less than EUR 50 million.

2. Where undertakings providing public communications networks or publicly available electronic communications services are not subject to the requirements of company law and do not satisfy the small and medium-sized enterprise criteria of Community law accounting rules, their financial reports shall be

drawn up and submitted to independent audit and published. The audit shall be carried out in accordance with the relevant Community and national rules.

This requirement shall also apply to the separate accounts required under paragraph 1(a).

Article 20

Dispute resolution between undertakings

1. In the event of a dispute arising in connection with obligations arising under this Directive or the Specific Directives between undertakings providing electronic communications networks or services in a Member State, the national regulatory authority concerned shall, at the request of either party, and without prejudice to the provisions of paragraph 2, issue a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months except in exceptional circumstances. The Member State concerned shall require that all parties cooperate fully with the national regulatory authority.

2. Member States may make provision for national regulatory authorities to decline to resolve a dispute through a binding decision where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. The national regulatory authority shall inform the parties without delay. If after four months the dispute is not resolved, and if the dispute has not been brought before the courts by the party seeking redress, the national regulatory authority shall issue, at the request of either party, a binding decision to resolve the dispute in the shortest possible time frame and in any case within four months.

3. In resolving a dispute, the national regulatory authority shall take decisions aimed at achieving the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.

4. The decision of the national regulatory authority shall be made available to the public, having regard to the requirements of business confidentiality. The parties concerned shall be given a full statement of the reasons on which it is based.

5. The procedure referred to in paragraphs 1, 3 and 4 shall not preclude either party from bringing an action before the courts.

Article 21

Resolution of cross-border disputes

1. In the event of a cross-border dispute arising under this Directive or the Specific Directives between parties in different Member States, where the dispute lies within the competence of national regulatory authorities from more than one Member State, the procedure set out in paragraphs 2, 3 and 4 shall be applicable.

2. Any party may refer the dispute to the national regulatory authorities concerned. The national regulatory authorities shall coordinate their efforts in order to bring about a resolution of the dispute, in accordance with the objectives set out in Article 8. Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives.

3. Member States may make provision for national regulatory authorities jointly to decline to resolve a dispute where other mechanisms, including mediation, exist and would better contribute to resolution of the dispute in a timely manner in accordance with the provisions of Article 8. They shall inform the parties without delay. If after four months the dispute is not resolved, if the dispute has not been brought before the courts by the party seeking redress, and if either party requests it, the national regulatory authorities

shall coordinate their efforts in order to bring about a resolution of the dispute, in accordance with the provisions set out in Article 8.

4. The procedure referred to in paragraph 2 shall not preclude either party from bringing an action before the courts.

Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services

(34) Flexibility in spectrum management and access to spectrum should be increased through technology and service-neutral authorisations to allow spectrum users to choose the best technologies and services to apply in frequency bands declared available for electronic communications services in the relevant national frequency allocation plans in accordance with Community law (the "principles of technology and service neutrality"). The administrative determination of technologies and services should apply when general interest objectives are at stake and should be clearly justified and subject to regular periodic review.

(35) Restrictions on the principle of technology neutrality should be appropriate and justified by the need to avoid harmful interference, for example by imposing emission masks and power levels, to ensure the protection of public health by limiting public exposure to electromagnetic fields, to ensure the proper functioning of services through an adequate level of technical quality of service, while not necessarily precluding the possibility of using more than one service in the same frequency band, to ensure proper sharing of spectrum, in particular where its use is only subject to general authorisations, to safeguard efficient use of spectrum, or to fulfil a general interest objective in conformity with Community law.

(36) Spectrum users should also be able to freely choose the services they wish to offer over the spectrum subject to transitional measures to deal with previously acquired rights. On the other hand, measures should be allowed which require the provision of a specific service to meet clearly defined general interest objectives such as safety of life, the need to promote social, regional and territorial cohesion, or the avoidance of the inefficient use of spectrum to be permitted where necessary and proportionate. Those objectives should include the promotion of cultural and linguistic diversity and media pluralism as defined by Member States in conformity with Community law. Except where necessary to protect safety of life or, exceptionally, to fulfil other general interest objectives as defined by Member States in accordance with Community law, exceptions should not result in certain services having exclusive use, but should rather grant them priority so that, in so far as possible, other services or technologies may coexist in the same band.

(37) It lies within the competence of the Member States to define the scope and nature of any exception regarding the promotion of cultural and linguistic diversity and media pluralism.

(38) As the allocation of spectrum to specific technologies or services is an exception to the principles of technology and service neutrality and reduces the freedom to choose the service provided or technology used, any proposal for such allocation should be transparent and subject to public consultation.

(39) In the interests of flexibility and efficiency, national regulatory authorities may allow spectrum users freely to transfer or lease their usage rights to third parties. This would allow spectrum valuation by the market. In view of their power to ensure effective use of spectrum, national regulatory authorities should

take action so as to ensure that trading does not lead to a distortion of competition where spectrum is left unused.

(40) The introduction of technology and service neutrality and trading for existing spectrum usage rights may require transitional rules, including measures to ensure fair competition, as the new system may entitle certain spectrum users to start competing with spectrum users having acquired their spectrum rights under more burdensome terms and conditions. Conversely, where rights have been granted as a derogation from the general rules or according to criteria other than those which are objective, transparent, proportionate and non-discriminatory with a view to achieving a general interest objective, the situation of the holders of such rights should not in an unjustified manner be to the detriment of their new competitors beyond what is necessary to achieve that general interest objective or another related general interest objective.

Article 1

Amendments to Directive 2002/21/EC (Framework Directive)

Directive 2002/21/EC is hereby amended as follows:

23) Article 21 shall be replaced by the following:

"Article 21

Resolution of cross-border disputes

1. In the event of a cross-border dispute arising under this Directive or the Specific Directives between parties in different Member States, and where the dispute lies within the competence of national regulatory authorities from more than one Member State, the provisions set out in paragraphs 2, 3 and 4 shall be applicable.

2. Any party may refer the dispute to the national regulatory authorities concerned. The competent national regulatory authorities shall coordinate their efforts and shall have the right to consult BEREC in order to bring about a consistent resolution of the dispute, in accordance with the objectives set out in Article 8.

Any obligations imposed by the national regulatory authorities on undertakings as part of the resolution of a dispute shall comply with this Directive and the Specific Directives.

Any national regulatory authority which has competence in such a dispute may request BEREC to adopt an opinion as to the action to be taken in accordance with the provisions of the Framework Directive and/or the Specific Directives to resolve the dispute.

Where such a request has been made to BEREC, any national regulatory authority with competence in any aspect of the dispute shall await BEREC's opinion before taking action to resolve the dispute. This shall not preclude national regulatory authorities from taking urgent measures where necessary.

Any obligations imposed on an undertaking by the national regulatory authority in resolving a dispute shall respect the provisions of this Directive or the Specific Directives and take the utmost account of the opinion adopted by BEREC.

3. Member States may make provision for the competent national regulatory authorities jointly to decline to resolve a dispute where other mechanisms, including mediation, exist and would better contribute to resolving of the dispute in a timely manner in accordance with the provisions of Article 8.

They shall inform the parties without delay. If after four months the dispute is not resolved, where the dispute has not been brought before the courts by the party seeking redress and if either party requests it, the national regulatory authorities shall coordinate their efforts in order to resolve the dispute, in accordance with the provisions set out in Article 8 and taking the utmost account of any opinion adopted by BEREC.

4. The procedure referred to in paragraph 2 shall not preclude either party from bringing an action before the courts.";

24) the following Article shall be inserted:

"Article 21a

Penalties

Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by 25 May 2011 and shall notify it without delay of any subsequent amendment affecting them.";

Article 2

Amendments to Directive 2002/19/EC (Access Directive)

Directive 2002/19/EC is hereby amended as follows:

10) the following Articles shall be inserted:

"Article 13a

Functional separation

1. Where the national regulatory authority concludes that the appropriate obligations imposed under Articles 9 to 13 have failed to achieve effective competition and that there are important and persisting competition problems and/or market failures identified in relation to the wholesale provision of certain access product markets, it may, as an exceptional measure, in accordance with the provisions of the second subparagraph of Article 8(3), impose an obligation on vertically integrated undertakings to place activities related to the wholesale provision of relevant access products in an independently operating business entity.

That business entity shall supply access products and services to all undertakings, including to other business entities within the parent company, on the same timescales, terms and conditions, including those relating to price and service levels, and by means of the same systems and processes.

2. When a national regulatory authority intends to impose an obligation for functional separation, it shall submit a proposal to the Commission that includes:

(a) evidence justifying the conclusions of the national regulatory authority as referred to in paragraph 1;

(b) a reasoned assessment that there is no or little prospect of effective and sustainable infrastructure-based competition within a reasonable time-frame;

(c) an analysis of the expected impact on the regulatory authority, on the undertaking, in particular on the workforce of the separated undertaking and on the electronic communications sector as a whole, and on incentives to invest in a sector as a whole, particularly with regard to the need to ensure social and territorial cohesion, and on other stakeholders including, in particular, the expected impact on competition and any potential entailing effects on consumers;

(d) an analysis of the reasons justifying that this obligation would be the most efficient means to enforce remedies aimed at addressing the competition problems/markets failures identified.

3. The draft measure shall include the following elements:

(a) the precise nature and level of separation, specifying in particular the legal status of the separate business entity;

(b) an identification of the assets of the separate business entity, and the products or services to be supplied by that entity;

(c) the governance arrangements to ensure the independence of the staff employed by the separate business entity, and the corresponding incentive structure;

(d) rules for ensuring compliance with the obligations;

(e) rules for ensuring transparency of operational procedures, in particular towards other stakeholders;

(f) a monitoring programme to ensure compliance, including the publication of an annual report.

4. Following the Commission's decision on the draft measure taken in accordance with Article 8(3), the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive). On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

5. An undertaking on which functional separation has been imposed may be subject to any of the obligations identified in Articles 9 to13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).

Article 13b

Voluntary separation by a vertically integrated undertaking

1. Undertakings which have been designated as having significant market power in one or several relevant markets in accordance with Article 16 of Directive 2002/21/EC (Framework Directive) shall inform the national regulatory authority in advance and in a timely manner, in order to allow the national regulatory authority to assess the effect of the intended transaction, when they intend to transfer their local access network assets or a substantial part thereof to a separate legal entity under different ownership, or to establish a separate business entity in order to provide to all retail providers, including its own retail divisions, fully equivalent access products.

Undertakings shall also inform the national regulatory authority of any change of that intent as well as the final outcome of the process of separation.

2. The national regulatory authority shall assess the effect of the intended transaction on existing regulatory obligations under Directive 2002/21/EC (Framework Directive).

For that purpose, the national regulatory authority shall conduct a coordinated analysis of the different markets related to the access network in accordance with the procedure set out in Article 16 of Directive 2002/21/EC (Framework Directive).

On the basis of its assessment, the national regulatory authority shall impose, maintain, amend or withdraw obligations, in accordance with Articles 6 and 7 of Directive 2002/21/EC (Framework Directive).

3. The legally and/or operationally separate business entity may be subject to any of the obligations identified in Articles 9 to 13 in any specific market where it has been designated as having significant market power in accordance with Article 16 of Directive 2002/21/EC (Framework Directive), or any other obligations authorised by the Commission pursuant to Article 8(3).";

Article 3

Amendments to Directive 2002/20/EC (Authorisation Directive)

Directive 2002/20/EC is hereby amended as follows:

6) Article 10 shall be amended as follows:

(a) paragraph 1, 2 and 3 shall be replaced by the following:

"1. National regulatory authorities shall monitor and supervise compliance with the conditions of the general authorisation or of rights of use and with the specific obligations referred to in Article 6(2), in accordance with Article 11.

National regulatory authorities shall have the power to require undertakings providing electronic communications networks or services covered by the general authorisation or enjoying rights of use for radio frequencies or numbers to provide all information necessary to verify compliance with the conditions of the general authorisation or of rights of use or with the specific obligations referred to in Article 6(2), in accordance with Article 11.

2. Where a national regulatory authority finds that an undertaking does not comply with one or more of the conditions of the general authorisation or of rights of use, or with the specific obligations referred to in Article 6(2), it shall notify the undertaking of those findings and give the undertaking the opportunity to state its views, within a reasonable time limit.

3. The relevant authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.

In this regard, Member States shall empower the relevant authorities to impose:

(a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect; and

(b) orders to cease or delay provision of a service or bundle of services which, if continued, would result in significant harm to competition, pending compliance with access obligations imposed following a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive).

The measures and the reasons on which they are based shall be communicated to the undertaking concerned without delay and shall stipulate a reasonable period for the undertaking to comply with the measure.";

(b) paragraph 4 shall be replaced by the following:

"4. Notwithstanding the provisions of paragraphs 2 and 3, Member States shall empower the relevant authority to impose financial penalties where appropriate on undertakings for failure to provide information in accordance with the obligations imposed under Article 11(1)(a) or (b) of this Directive and Article 9 of Directive 2002/19/EC (Access Directive) within a reasonable period stipulated by the national regulatory authority.";

(c) paragraph 5 shall be replaced by the following:

"5. In cases of serious or repeated breaches of the conditions of the general authorisation or of the rights of use, or specific obligations referred to in Article 6(2), where measures aimed at ensuring compliance as referred to in paragraph 3 of this Article have failed, national regulatory authorities may prevent an undertaking from continuing to provide electronic communications networks or services or suspend or withdraw rights of use. Sanctions and penalties which are effective, proportionate and dissuasive may be applied to cover the period of any breach, even if the breach has subsequently been rectified.";

(d) paragraph 6 shall be replaced by the following:

"6. Irrespective of the provisions of paragraphs 2, 3 and 5, where the relevant authority has evidence of a breach of the conditions of the general authorisation rights of use or of the specific obligations referred to in Article 6(2) that represents an immediate and serious threat to public safety, public security or public health or will create serious economic or operational problems for other providers or users of electronic communications networks or services or other users of the radio spectrum, it may take urgent interim measures to remedy the situation in advance of reaching a final decision. The undertaking concerned shall thereafter be given a reasonable opportunity to state its views and propose any remedies. Where appropriate, the relevant authority may confirm the interim measures, which shall be valid for a maximum of 3 months, but which may, in circumstances where enforcement procedures have not been completed, be extended for a further period of up to three months.";

Regulation (EC) No 2887/2000 of the European Parliament and of the Council of 18 December 2000 on unbundled access to the local loop

Article 3

Provision of unbundled access

1. Notified operators shall publish from 31 December 2000, and keep updated, a reference offer for unbundled access to their local loops and related facilities, which shall include at least the items listed in the Annex. The offer shall be sufficiently unbundled so that the beneficiary does not have to pay for network elements or facilities which are not necessary for the supply of its services, and shall contain a description of the components of the offer, associated terms and conditions, including charges.

2. Notified operators shall from 31 December 2000 meet reasonable requests from beneficiaries for unbundled access to their local loops and related facilities, under transparent, fair and non-discriminatory conditions. Requests shall only be refused on the basis of objective criteria, relating to technical feasibility or the need to maintain network integrity. Where access is refused, the aggrieved party may submit the case to the dispute resolution procedure referred to in Article 4(5). Notified operators shall provide beneficiaries with facilities equivalent to those provided for their own services or to their associated companies, and with the same conditions and time-scales.

3. Without prejudice to Article 4(4), notified operators shall charge prices for unbundled access to the local loop and related facilities set on the basis of cost-orientation.

Annex 3

ANNEX

MINIMUM LIST OF ITEMS TO BE INCLUDED IN A REFERENCE OFFER FOR UNBUNDLED ACCESS TO THE LOCAL LOOP TO BE PUBLISHED BY NOTIFIED OPERATORS

A. Conditions for unbundled access to the local loop

1. Network elements to which access is offered covering in particular the following elements:

(a) access to local loops;

(b) access to non-voice band frequency spectrum of a local loop, in the case of shared access to the local loop;

2. Information concerning the locations of physical access sites(1), availability of local loops in specific parts of the access network;

3. Technical conditions related to access and use of local loops, including the technical characteristics of the twisted metallic pair in the local loop;

4. Ordering and provisioning procedures, usage restrictions.

B. Collocation services

1. Information on the notified operator's relevant sites(2);

2. Collocation options at the sites indicated under point 1 (including physical collocation and, as appropriate, distant collocation and virtual collocation);

3. Equipment characteristics: restrictions, if any, on equipment that can be collocated;

4. Security issues: measures put in place by notified operators to ensure the security of their locations;

5. Access conditions for staff of competitive operators;

6. Safety standards;

7. Rules for the allocation of space where collocation space is limited;

8. Conditions for beneficiaries to inspect the locations at which physical collocation is available, or sites where collocation has been refused on grounds of lack of capacity.

C. Information systems

Conditions for access to notified operator's operational support systems, information systems or databases for pre-ordering, provisioning, ordering, maintenance and repair requests and billing.

D. Supply conditions

1. Lead time for responding to requests for supply of services and facilities; service level agreements, fault resolution, procedures to return to a normal level of service and quality of service parameters;

2. Standard contract terms, including, where appropriate, compensation provided for failure to meet lead times;

3. Prices or pricing formulae for each feature, function and facility listed above.

(1) Availability of this information may be restricted to interested parties only, in order to avoid public security concerns.

(2) Availability of this information may be restricted to interested parties only, in order to avoid public security concerns.

UNITED STATES

Telecommunication Act of 1996

''SEC. 251. INTERCONNECTION.

''(a) GENERAL DUTY OF TELECOMMUNICATIONS CARRIERS.

Each telecommunications carrier has the duty

''(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

''(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

''(b) OBLIGATIONS OF ALL LOCAL EXCHANGE CARRIERS.

Each local exchange carrier has the following duties:

''(1) RESALE. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

''(2) NUMBER PORTABILITY. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

''(3) DIALING PARITY. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

''(4) ACCESS TO RIGHTS-OF-WAY. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224.

''(5) RECIPROCAL COMPENSATION. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

''(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS.

In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

''(1) DUTY TO NEGOTIATE. The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

''(2) INTERCONNECTION. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network

‘‘(A) for the transmission and routing of telephone exchange service and exchange access;

‘‘(B) at any technically feasible point within the carrier’s network;

‘‘(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

‘‘(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

‘‘(3) UNBUNDLED ACCESS. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

‘‘(4) RESALE. The duty

‘‘(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

‘‘(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

‘‘(5) NOTICE OF CHANGES. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

‘‘(6) COLLOCATION. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

‘‘(d) IMPLEMENTATION.

‘‘(1) IN GENERAL. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

‘‘(2) ACCESS STANDARDS. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether

‘‘(A) access to such network elements as are proprietary in nature is necessary; and

‘‘(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

‘‘(3) PRESERVATION OF STATE ACCESS REGULATIONS. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that

‘‘(A) establishes access and interconnection obligations of local exchange carriers;

‘‘(B) is consistent with the requirements of this section; And

‘‘(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

‘‘(e) NUMBERING ADMINISTRATION.

‘‘(1) COMMISSION AUTHORITY AND JURISDICTION. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

‘‘(2) COSTS.—The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

‘‘(f) EXEMPTIONS, SUSPENSIONS, AND MODIFICATIONS.

‘‘(1) EXEMPTION FOR CERTAIN RURAL TELEPHONE COMPANIES.

‘‘(A) EXEMPTION. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

‘‘(B) STATE TERMINATION OF EXEMPTION AND IMPLEMENTATION SCHEDULE. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph

(A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

‘‘(C) LIMITATION ON EXEMPTION. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

‘‘(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS. A local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification—

‘‘(A) is necessary

‘‘(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

‘‘(ii) to avoid imposing a requirement that is unduly economically burdensome; or

‘‘(iii) to avoid imposing a requirement that is technically infeasible; and

‘‘(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

‘‘(g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS. On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and non-discriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

‘‘(h) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER.

‘‘(1) DEFINITION. For purposes of this section, the term ‘incumbent local exchange carrier’ means, with respect to an area, the local exchange carrier that

‘‘(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

‘‘(B)(i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission’s regulations (47 C.F.R. 69.601(b)); or ‘‘(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

‘‘(2) TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS.

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if

‘‘(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

‘‘(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

‘‘(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

‘‘(i) SAVINGS PROVISION. Nothing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.

''SEC. 252. PROCEDURES FOR NEGOTIATION, ARBITRATION, AND APPROVAL OF AGREEMENTS.

''(a) AGREEMENTS ARRIVED AT THROUGH NEGOTIATION.

''(1) VOLUNTARY NEGOTIATIONS. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

''(2) MEDIATION. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

''(b) AGREEMENTS ARRIVED AT THROUGH COMPULSORY ARBITRATION.

''(1) ARBITRATION. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

''(2) DUTY OF PETITIONER.

''(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning

''(i) the unresolved issues;

''(ii) the position of each of the parties with respect to those issues; and

''(iii) any other issue discussed and resolved by the parties.

''(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

''(3) OPPORTUNITY TO RESPOND. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

''(4) ACTION BY STATE COMMISSION.

''(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

''(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

‘‘(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

‘‘(5) REFUSAL TO NEGOTIATE. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

‘‘(c) STANDARDS FOR ARBITRATION. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall

‘‘(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;

‘‘(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

‘‘(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

‘‘(d) PRICING STANDARDS.

‘‘(1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section

‘‘(A) shall be

‘‘(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

‘‘(ii) nondiscriminatory, and

‘‘(B) may include a reasonable profit.

‘‘(2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.

‘‘(A) IN GENERAL. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless

‘‘(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of the other carrier; and

‘‘(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

‘‘(B) RULES OF CONSTRUCTION. This paragraph shall not be construed

‘‘(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

‘‘(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

‘‘(3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES.

For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

‘‘(e) APPROVAL BY STATE COMMISSION.

‘‘(1) APPROVAL REQUIRED. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

‘‘(2) GROUNDS FOR REJECTION. The State commission may only reject

‘‘(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that—

‘‘(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or ‘‘(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

‘‘(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

‘‘(3) PRESERVATION OF AUTHORITY. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

‘‘(4) SCHEDULE FOR DECISION. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

‘‘(5) COMMISSION TO ACT IF STATE WILL NOT ACT. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order pre-empting the State commission’s jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

‘‘(6) REVIEW OF STATE COMMISSION ACTIONS. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission’s actions shall be the exclusive remedies for a State commission’s failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

‘‘(f) STATEMENTS OF GENERALLY AVAILABLE TERMS.

‘‘(1) IN GENERAL. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

‘‘(2) STATE COMMISSION REVIEW. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

‘‘(3) SCHEDULE FOR REVIEW. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission

‘‘(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

‘‘(B) permit such statement to take effect.

‘‘(4) AUTHORITY TO CONTINUE REVIEW. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

‘‘(5) DUTY TO NEGOTIATE NOT AFFECTED. The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

‘‘(g) CONSOLIDATION OF STATE PROCEEDINGS. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

‘‘(h) FILING REQUIRED. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

‘‘(i) AVAILABILITY TO OTHER TELECOMMUNICATIONS CARRIERS. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

‘‘(j) DEFINITION OF INCUMBENT LOCAL EXCHANGE CARRIER. For purposes of this section, the term ‘incumbent local exchange carrier’ has the meaning provided in section 251(h).

‘‘SEC. 259. INFRASTRUCTURE SHARING.

‘‘(a) REGULATIONS REQUIRED.—The Commission shall prescribe, within one year after the date of enactment of the Telecommunications Act of 1996, regulations that require incumbent local exchange carriers (as defined in section 251(h)) to make available to any qualifying carrier such public switched network infrastructure, technology, information, and telecommunications facilities and functions as may be requested by such qualifying carrier for the purpose of enabling such qualifying carrier to provide telecommunications services, or to provide access to information services, in the service area in which such qualifying carrier has requested and obtained designation as an eligible telecommunications carrier under section 214(e).

‘‘(b) TERMS AND CONDITIONS OF REGULATIONS.—The regulations prescribed by the Commission pursuant to this section shall

‘‘(1) not require a local exchange carrier to which this section applies to take any action that is economically unreasonable or that is contrary to the public interest;

‘‘(2) permit, but shall not require, the joint ownership or operation of public switched network infrastructure and services by or among such local exchange carrier and a qualifying carrier;

‘‘(3) ensure that such local exchange carrier will not be treated by the Commission or any State as a common carrier for hire or as offering common carrier services with respect to any infrastructure, technology, information, facilities, or functions made available to a qualifying carrier in accordance with regulations issued pursuant to this section;

‘‘(4) ensure that such local exchange carrier makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier, as determined in accordance with guidelines prescribed by the Commission in regulations issued pursuant to this section;

‘‘(5) establish conditions that promote cooperation between local exchange carriers to which this section applies and qualifying carriers;

‘‘(6) not require a local exchange carrier to which this section applies to engage in any infrastructure sharing agreement for any services or access which are to be provided or offered to consumers by the qualifying carrier in such local exchange carrier’s telephone exchange area; and

‘‘(7) require that such local exchange carrier file with the Commission or State for public inspection, any tariffs, contracts, or other arrangements showing the rates, terms, and conditions under which such carrier is making available public switched network infrastructure and functions under this section.

‘‘(c) INFORMATION CONCERNING DEPLOYMENT OF NEW SERVICES AND EQUIPMENT. A local exchange carrier to which this section applies that has entered into an infrastructure sharing agreement under this section shall provide to each party to such agreement timely information on the planned deployment of telecommunications services and equipment, including any software or upgrades of software integral to the use or operation of such telecommunications equipment.

‘‘(d) DEFINITION. For purposes of this section, the term ‘qualifying carrier’ means a telecommunications carrier that

‘‘(1) lacks economies of scale or scope, as determined in accordance with regulations prescribed by the Commission pursuant to this section; and

‘‘(2) offers telephone exchange service, exchange access, and any other service that is included in universal service, to all consumers without preference throughout the service area for which such carrier has been designated as an eligible telecommunications carrier under section 214(e).

‘‘SEC. 272. SEPARATE AFFILIATE; SAFEGUARDS.

‘‘(a) SEPARATE AFFILIATE REQUIRED FOR COMPETITIVE ACTIVITIES.

‘‘(1) IN GENERAL. A Bell operating company (including any affiliate) which is a local exchange carrier that is subject to the requirements of section 251(c) may not provide any service described in paragraph (2) unless it provides that service through one or more affiliates that

''(A) are separate from any operating company entity that is subject to the requirements of section 251(c); and

''(B) meet the requirements of subsection (b).

''(2) SERVICES FOR WHICH A SEPARATE AFFILIATE IS REQUIRED. The services for which a separate affiliate is required by paragraph (1) are:

''(A) Manufacturing activities (as defined in section 273(h)).

''(B) Origination of interLATA telecommunications services, other than

''(i) incidental interLATA services described in paragraphs (1), (2), (3), (5), and (6) of section 271(g);

''(ii) out-of-region services described in section 271(b)(2); or

''(iii) previously authorized activities described in section 271(f).

''(C) InterLATA information services, other than electronic publishing (as defined in section 274(h)) and alarm monitoring services (as defined in section 275(e)).

''(b) STRUCTURAL AND TRANSACTIONAL REQUIREMENTS. The separate affiliate required by this section

''(1) shall operate independently from the Bell operating company;

''(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate;

''(3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;

''(4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and

''(5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

''(c) NONDISCRIMINATION SAFEGUARDS. In its dealings with its affiliate described in subsection (a), a Bell operating company

''(1) may not discriminate between that company or affiliate and any other entity in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards; and

''(2) shall account for all transactions with an affiliate described in subsection (a) in accordance with accounting principles designated or approved by the Commission.

''(d) BIENNIAL AUDIT.

''(1) GENERAL REQUIREMENT. A company required to operate a separate affiliate under this section shall obtain and pay for a joint Federal/State audit every 2 years conducted by an independent auditor to determine whether such company has complied with this section and the regulations promulgated under this section, and particularly whether such company has complied with the separate accounting requirements under subsection (b).

‘‘(2) RESULTS SUBMITTED TO COMMISSION; STATE COMMISSIONS. The auditor described in paragraph (1) shall submit the results of the audit to the Commission and to the State commission of each State in which the company audited provides service, which shall make such results available for public inspection. Any party may submit comments on the final audit report.

‘‘(3) ACCESS TO DOCUMENTS. For purposes of conducting audits and reviews under this subsection

‘‘(A) the independent auditor, the Commission, and the State commission shall have access to the financial accounts and records of each company and of its affiliates necessary to verify transactions conducted with that company that are relevant to the specific activities permitted under this section and that are necessary for the regulation of rates;

‘‘(B) the Commission and the State commission shall have access to the working papers and supporting materials of any auditor who performs an audit under this section; and

‘‘(C) the State commission shall implement appropriate procedures to ensure the protection of any proprietary information submitted to it under this section.

‘‘(e) FULFILLMENT OF CERTAIN REQUESTS. A Bell operating company and an affiliate that is subject to the requirements of section 251(c)

‘‘(1) shall fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone exchange service and exchange access to itself or to its affiliates;

‘‘(2) shall not provide any facilities, services, or information concerning its provision of exchange access to the affiliate described in subsection (a) unless such facilities, services, or information are made available to other providers of interLATA services in that market on the same terms and conditions;

‘‘(3) shall charge the affiliate described in subsection (a), or impute to itself (if using the access for its provision of its own services), an amount for access to its telephone exchange service and exchange access that is no less than the amount charged to any unaffiliated interexchange carriers for such service; and

‘‘(4) may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated.

‘‘(f) SUNSET.

‘‘(1) MANUFACTURING AND LONG DISTANCE. The provisions of this section (other than subsection (e)) shall cease to apply with respect to the manufacturing activities or the interLATA telecommunications services of a Bell operating company 3 years after the date such Bell operating company or any Bell operating company affiliate is authorized to provide interLATA telecommunications services under section 271(d), unless the Commission extends such 3-year period by rule or order.

‘‘(2) INTERLATA INFORMATION SERVICES. The provisions of this section (other than subsection (e)) shall cease to apply with respect to the interLATA information services of a Bell operating company 4 years after the date of enactment of the Telecommunications Act of 1996, unless the Commission extends such 4-year period by rule or order.

‘‘(3) PRESERVATION OF EXISTING AUTHORITY. Nothing in this subsection shall be construed to limit the authority of the Commission under any other section of this Act to prescribe safeguards consistent with the public interest, convenience, and necessity.

‘‘(g) JOINT MARKETING.

''(1) AFFILIATE SALES OF TELEPHONE EXCHANGE SERVICES. A Bell operating company affiliate required by this section may not market or sell telephone exchange services provided by the Bell operating company unless that company permits other entities offering the same or similar service to market and sell its telephone exchange services.

''(2) BELL OPERATING COMPANY SALES OF AFFILIATE SERVICES. A Bell operating company may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d).

''(3) RULE OF CONSTRUCTION. The joint marketing and sale of services permitted under this subsection shall not be considered to violate the non discrimination provisions of subsection (c).

''(h) TRANSITION. With respect to any activity in which a Bell operating company is engaged on the date of enactment of the Telecommunications Act of 1996, such company shall have one year from such date of enactment to comply with the requirements of this section.

UNITED STATES CODE

TITLE 47--TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 2--SUBMARINE CABLES

Sec. 34. Licenses for landing or operating cables connecting United States with foreign country; necessity for

No person shall land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States. The conditions of sections 34 to 39 of this title shall not apply to cables, all of which, including both terminals, lie wholly within the continental United States.

Sec. 35. Withholding or revoking of licenses by President; terms and conditions of licenses

The President may withhold or revoke such license when he shall be satisfied after due notice and hearing that such action will assist in securing rights for the landing or operation of cables in foreign countries, or in maintaining the rights or interests of the United States or of its citizens in foreign countries, or will promote the security of the United States, or may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed. The license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States. Nothing herein contained shall be construed to limit the power and jurisdiction of the Federal Communications Commission with respect to the transmission of messages.

Sec. 36. Preventing landing or operating of cables; injunction

The President is empowered to prevent the landing of any cable about to be landed in violation of sections 34 to 39 of this title. When any such cable is about to be or is landed or is being operated without a license, any district court of the United States exercising jurisdiction in the district in which such cable is about to be or is landed, or any district court of the United States having jurisdiction of the parties, shall have jurisdiction, at the suit of the United States, to enjoin the landing or operation of such cable or to compel, by injunction, the removal thereof.

Sec. 37. Violations; punishment

Whoever knowingly commits, instigates, or assists in any act forbidden by section 34 of this title shall be guilty of a misdemeanor and shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

Sec. 38. ''United States'' defined

The term ''United States'' as used in sections 34 to 39 of this title includes the Canal Zone and all territory continental or insular, subject to the jurisdiction of the United States of America.

Sec. 39. Amendment, modification, etc., of rights granted

No right shall accrue to any government, person, or corporation under the terms of sections 34 to 39 of this title that may not be rescinded, changed, modified, or amended by the Congress.

CODE OF FEDERAL REGULATIONS – Title 47, Section 1.767

1.767 – Cable landing licenses.

(a) Applications for cable landing licenses under 47 U.S.C. 34-39 and Executive Order No. 10530 should be filed in accordance with the provisions of that Executive Order. These applications should contain:

(1) The name, address and telephone number(s) of the applicant;

(2) The Government, State, or Territory under the laws of which each corporate or partnership applicant is organized;

(3) The name, title, post office address, and telephone number of the officer and any other contact point, such as legal counsel, to whom correspondence concerning the application is to be addressed;

(4) A description of the submarine cable, including the type and number of channels and the capacity thereof;

(5) A specific description of the cable landing stations on the shore of the United States and in foreign countries where the cable will land. The description shall include a map showing specific geographic coordinates, and may also include street addresses, of each landing station. The map must also specify the coordinates of any beach joint where those coordinates differ from the coordinates of the cable station. The applicant initially may file a general geographic description of the landing points; however, grant of the application will be conditioned on the Commission's final approval of a more specific description of the landing points, including all information required by this paragraph, to be filed by the applicant no later than ninety (90) days prior to construction. The Commission will give public notice of the filing of this description, and grant of the license will be considered final if the Commission does not notify the applicant otherwise in writing no later than sixty (60) days after receipt of the specific description of the landing points, unless the Commission designates a different time period;

(6) A statement as to whether the cable will be operated on a common carrier or non-common carrier basis;

(7) A list of the proposed owners of the cable system, including each U.S. cable landing station, their respective voting and ownership interests in each U.S. cable landing station, their respective voting interests in the wet link portion of the cable system, and their respective ownership interests by segment in the cable;

(8) For each applicant of the cable system, a certification as to whether the applicant is, or is affiliated with, a foreign carrier , including an entity that owns or controls a foreign cable landing station in any of cable's destination markets. Include the citizenship of each applicant and information and certifications required in § 63.18(h) through (k), and in § 63.18(o) of this chapter;

(9) A certification that the applicant accepts and will abide by the routine conditions specified in paragraph (g) of this section; and

(10) Any other information that may be necessary to enable the Commission to act on the application.

(11)

(i) If applying for authority to assign to transfer control of an interest in a cable system, the applicant shall complete paragraphs (a)(1) through (a)(3) of this section for both the transferor/assignor and the transferee/assignee. Only the transferee/assignee needs to complete paragraphs (a)(8) through (a)(9) of this section. At the beginning of the application, the applicant should also include a narrative of the means by which the transfer or assignment will take place. The application shall also specify, on a segment specific basis, the percentage of voting and ownership interests being transferred or assigned in the cable system, including in a U.S. cable landing station. The Commission reserves the right to request additional information as to the particulars of the transaction to aid it in making its public interest determination.

(ii) In the event the transaction requiring an assignment or transfer of control application also requires the filing of a foreign carrier affiliation notification pursuant to § 1.768, the applicant shall reference in the application the foreign carrier affiliation notification and the date of its filing. *See § 1.768. See also* paragraph (g)(7) of this section (providing for post-transaction notification of pro forma assignments and transfers of control).

(iii) An assignee or transferee must notify the Commission no later than thirty (30) days after either consummation of the assignment or transfer. The notification shall identify the file numers under which the initial license and the authorization of the assignment or transfer were granted.

(b) These applications are acted upon by the Commission after obtaining the approval of the Secretary of State and such assistance from any executive department or establishment of the government as it may require.

(c) Original files relating to submarine cable landing licenses and applications for licenses since June 30, 1934, are kept by the Commission. Such applications for licenses (including all documents and exhibits filed with and made a part thereof, with the exception of any maps showing the exact location of the submarine cable or cables to be licensed) and the licenses issued pursuant thereto, with the exception of such maps, shall, unless otherwise ordered by the Commission, be open to public inspection in the offices of the Commission in Washington, D.C.

(d) Original files relating to licenses and applications for licenses for the landing operation of cables prior to June 30, 1934, were kept by the Department of State, and such files prior to 1930 have been transferred to the Executive and Foreign Affairs Branch of the General Records Office of the National Archives. Requests for inspection of these files should, however, be addressed to the Federal Communications Commission, Washington, D.C., 20554; and the Commission will obtain such files for a temporary period in order to permit inspection at the offices of the Commission.

(e) A separate application shall be filed with respect to each individual cable system for which a license is requested, or for which modification or amendment of a previous license is requested. The application fee for a non-common carrier cable landing license is payment type code BJT. Applicants for common carrier cable landing licenses shall pay the fees for both a common carrier cable landing license (payment type code CXT) and overseas cable construction (payment type code BIT). There is no application fee for

modification of a cable landing license, except that the fee for assignment or transfer of control of a cable landing license is payment type code CUT. See § 1.1107(2) of this chapter.

(f) Applicants shall disclose to any interested member of the public, upon written request, accurate information concerning the location and timing for the construction of a submarine cable system authorized under this section. This disclosure shall be made within 30 days of receipt of the request.

(g) Routine Conditions. Except as otherwise ordered by the Commission, the following rules apply to each licensee of a cable landing license granted on or after March 15, 2002.

(1) Grant of the cable landing license is subject to:

(i) All rules and regulations of the Federal Communications Commission;

(ii) Any treaties of conventions relating to communications to which the United States is or may hereafter become a party; and

(iii) Any action by the Commission or the Congress of the United States rescinding, changing, modifying or amending any rights accruing to any person by grant of the license;

(2) The location of the cable system within the territorial waters of the United States of America, its territories and possessions, and upon its shores shall be in conformity with plans approved by the Secretary of the Army. The cable shall be moved or shifted by the licensee at its expense upon request of the Secretary of the Army, whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance and improvement of harbors for navigational purposes;

(3) The licensee shall at all times comply with any requirements of United States government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus for the purpose of protecting and safeguarding the cables from injury or destruction of enemies of the United States of America;

(4) The licensee, or any person or company controlling it, controlled by it, or under direct or indirect common control with it, does not enjoy and shall not acquire any right to handle traffic to or from the United States, its territories or its possessions unless such service is authorized by the Commission pursuant to section 214 of the Communications Act, as amended;

(5)

(i) The licensee shall be prohibited from agreeing to accept special concessions directly or indirectly from any foreign carrier, including any entity that owns or controls a foreign cable landing station, where the foreign carrier possesses sufficient market power on the foreign end of the route to affect competition adversely in the U.S. market, and from agreeing to accept special concessions in the future.

(ii) For purposes of this section, a special concession is defined as an exclusive arrangement involving services, facilities, or functions on the foreign end of a U.S. international route that are necessary to land, connect, or operate submarine cables, where the arrangement is not offered to similarly situated U.S. submarine cable owners, indefeasible-right-of-user holders, or lessors, and includes arrangements for the terms for acquisition, resale, lease, transfer and use of capacity on the cable; access to collocation space; the opportunity to provide or obtain backhaul capacity; access to technical network information; and interconnection to the public switched telecommunications network.

Note to paragraph (g)(5): Licensees may rely on the Commission's list of foreign carriers that do not qualify for the presumption that they lack market power in particular foreign points for purposes of determining which foreign carriers are the subject of the requirements of this section. The Commission's

list of foreign carriers that do not qualify for the presumption that they lack market power is available from the International Bureau's World Wide Web site at *www.fcc.gov/ib*.

(6) Except as provided in paragraph (g)(7) of this section, the cable landing license and rights granted in the license shall not be transferred, assigned, or disposed of, or disposed of indirectly by transfer of control of the licensee, unless the Federal Communications Commission gives prior consent in writing;

(7) A *pro forma* assignee or a person or company that is the subject of a *pro forma* transfer of control of a cable landing license is not required to seek prior approval for the *pro forma* transaction. A *pro forma* assignee or person or company that is the subject of a *pro forma* transfer of control must notify the Commission no later than thirty (30) days after the assignment or transfer of control is consummated. The notification must certify that the assignment or transfer of control was *pro forma*, as defined in § 63.24 of this chapter, and, together with all the previous *pro forma* transactions, does not result in a change of the licensee's ultimate control. The licensee may file a single notification for an assignment or transfer of control of multiple licenses issued in the name of the licensee if each license is identified by the file number under which it was granted.

(8) Unless the licensee has notified the Commission in the application of the precise locations at which the cable will land, as required by paragraph (a)(5) of this section, the licensee shall notify the Commission no later than ninety (90) days prior to commencing construction at that landing location. The Commission will give public notice of the filing of each description, and grant of the cable landing license will be considered final with respect to that landing location unless the Commission issues a notice to the contrary no later than sixty (60) days after receipt of the specific description. *See* paragraph (a)(5) of this section.

(9) The Commission reserves the right to require the licensee to file an environmental assessment should it determine that the landing of the cable at the specific locations and construction of necessary cable landing stations may significantly affect the environment within the meaning of § 1.1307 implementing the National Environmental Policy Act of 1969. *See* § 1.1307(a) and (b). The cable landing license is subject to the modification by the Commission under its review of any environmental assessment or environmental impact statement that it may require pursuant to its rules. *See also* § 1.1306 note 1 and § 1.1307(c) and (d);

(10) The Commission reserves the right, pursuant to section 2 of the Cable Landing License Act, 47 U.S.C. 35, Executive Order No. 10530 as amended, and section 214 of the Communications Act of 1934, as amended, 47 U.S.C. 214, to impose common carrier regulation or other regulation consistent with the Cable Landing License Act on the operations of the cable system if it finds that the public interest so requires;

(11) The licensee, or in the case of multiple licensees, the licensees collectively, shall maintain de jure and de factor control of the U.S. portion of the cable system, including the cable landing stations in the United States, sufficient to comply with the requirements of the Commission's rules and any specific conditions of the license;

(12) The licensee shall comply with the requirements of § 1.768;

(13) The cable landing license is revocable by the Commission after due notice and opportunity for hearing pursuant to section 2 of the Cable Landing License Act, 47 U.S.C. 35, or for failure to comply with the terms of the license or with the Commission's rules; and

(14) The licensee shall notify the Commission within thirty (30) days of the date the cable is placed into service. The cable landing license shall expire twenty-five (25) years from the in-service date, unless renewed or extended upon proper application. Upon expiration, all rights granted under the license shall be terminated.

(h) Applicants/Licensees. Except as otherwise required by the Commission, the following entities, at a minimum, shall be applicants for, and licensees on, a cable landing license;

(1) Any entity that owns or controls a cable landing station in the United States;and

(2) All other entities owning or controlling a five percent (5%) or greater interest in the cable system and using the U.S. points of the cable system.

(i) Processing of cable landing license applications. The Commission will take action upon an application eligible for streamlined processing, as specified in paragraph (k) of this section, within forty-five (45) days after release of the public notice announcing the application as acceptable for filing and eligible for streamlined processing. If the Commission deems an application seeking streamlined processing acceptable for filing but ineligible for streamlined processing, or if an applicant does not seek streamlined processing, the Commission will issue public notice indicating that the application is ineligible for streamlined processing. Within ninety (90) days of the public notice, the Commission will take action upon the application or provide public notice that, because the application raises questions of extraordinary complexity, an additional 90-day period for review is needed. Each successive 90-day period may be so extended.

(j) Applications for streamlining. Each applicant seeking to use the streamlined grant procedure specified in paragraph (i) of this section shall request streamlined processing in its application. Applications for streamlined processing shall include the information and certifications required by paragraph (k) of this section. On the date of filing with the Commission, the applicant shall also send a complete copy of the application, or any major amendments or other material filings regarding the application to: U.S. Coordinator, EB/CIP, U.S. Department of State, 2201 C Street, NW, Washington, DC 20520-5818; Office of Chief Counsel/NTIA, U.S. Department of Commerce, 14th St./ and Constitution Ave., NW, Washington, DC 20230; and Defense Information Systems Agency, Code RGC, 701 S. Courthouse Road, Arlington, VA 22204, and shall certify such service on a service list attached to the application or other filing.

(k) Eligibility for streamlining. Each applicant must demonstrate eligibility for streamlining by:

(1) Certifying that it is not a foreign carrier and it is not affiliated with a foreign carrier in any of the cable's destination markets;

(2) Demonstrating pursuant to § 63.12(c)(l) (i) through (iii) of this chapter that any such foreign carrier or affiliated foreign carrier lacks market power; or

(3) Certifying that the destination market where the applicant is, or has an affiliation with, a foreign carrier is a World Trade Organization (WTO) Member and the applicant agrees to accept and abide by the reporting requirements set out in paragraph (l) of this section. An application that includes an applicant that is, or is affiliated with, a carrier with market power in a cable's non-WTO Member destination country is not eligible for streamlining.

(l) Reporting Requirements Applicable to Licensees Affiliated with a Carrier with market Power in a Cable's WTO Destination Market. Any licensee that is, or is affiliated with, a carrier with market power in any of the cable's WTO Member destination countries, and that requests streamlined processing of an application under paragraphs (j) and (k) of this section, must comply with the following requirements:

(1) File quarterly reports summarizing the provisioning and maintenance of all network facilities and services procured from the licensee's affiliate in that destination market, within ninety (90) days from the end of each calendar quarter. These reports shall contain the following:

(i)The types of facilities and services provided (for example, a lease of wet link capacity in the cable, collocation of licensee's equipment in the cable station with the ability to provide backhaul, or cable station and backhaul services provided to the licensee);

(ii)For provisioned facilities and services, the volume or quantity provisioned, and the time internal between order and delivery; and

(iii) The number of outages and intervals between fault report and facility or service restoration; and

(2) File quarterly circuit status reports, within ninety (90) days from the end of each calendar quarter and in the format set out by the § 43.82 of this chapter annual circuit status manual with the exception that activated or idle circuits must be reported on a facility-by-facility basis and derived circuits need not be specified; *See* § 63.10(c)(5) of this chapter.

(m)

(1) Except as specified in paragraph (m) (2) of this section, amendments to pending applications, and applications to modify a license, including amendments or applications to add a new applicant or licensee, shall be signed by each initial applicant or licensee respectively. Joint applicants or licensees may appoint one party to act as proxy for purposes of complying with this requirement.

(2) Any licensee that seeks to relinquish its interest in a cable landing license shall file an application to modify the license. Such application must include a demonstration that the applicant is not required to be a licensee under paragraph (h) of this section and that the remaining licensee(s) will retain collectively de jure and de facto control of the U.S. portion of the cable system sufficient to comply with the requirements of the Commission's rules and any specific conditions of the license, and must be served on each other licensee of the cable system.

(n) Subject to the availability of electronic forms, all applications and notifications described in this section must be filed electronically through the International Bureau Filing System (IBFS). A list of forms that are available for electronic filing can be found on the IBFS homepage. For information on electronic filing requirements, see part 1,§§ 1.1000-1.10018 and the IBFS homepage at www.fcc.gov/ibfs. See also §§ 63.20 and 63.53.

Note to § 1.767: The terms "affiliated" and "foreign carrier," as used in this section, are defined as in § 63.09 of this chapter except that the term "foreign carrier" also shall include any entity that owns or controls a cable landing station in a foreign market.

Executive Order No. 10530

PART IV

THE FEDERAL COMMUNICATIONS COMMISSION

Sec. 5.

(a) The Federal Communications Commission is hereby designated and empowered to exercise, without the approval, ratification, or other action of the President, all authority vested in the President by the act of May 27, 1921, ch. 12, 42 Stat. 8 (47 U.S.C. 34 to 39), including the authority to issue, withhold, or revoke licenses to land or operate submarine cables in the United States: Provided, That no such license shall be granted or revoked by the Commission except after obtaining approval of the Secretary of State and such advice from any executive department or establishment of the Government as the Commission may deem necessary. The Commission is authorized and directed to receive all applications for the said licenses.

(b) Executive Order No. 3513 of July 9, 1921, as amended by Executive Order No. 6779 of June 30, 1934, is hereby revoked.

FRANCE

Code des Postes et des Communications Electroniques

Article L33-1

I. – L'établissement et l'exploitation des réseaux ouverts au public et la fourniture au public de services de communications électroniques sont libres sous réserve d'une déclaration préalable auprès de l'Autorité de régulation des communications électroniques et des postes.

Toutefois, la déclaration n'est pas exigée pour l'établissement et l'exploitation des réseaux internes ouverts au public et pour la fourniture au public de services de communications électroniques sur ces réseaux.

La déclaration ne peut être faite par une personne qui a perdu, du fait d'un retrait ou d'une suspension prononcés en application de l'article L. 36-11, le droit d'établir et d'exploiter un réseau ouvert au public ou de fournir au public un service de communications électroniques ou par une personne qui a été condamnée à l'une des peines prévues par l'article L. 39.

L'établissement et l'exploitation des réseaux ouverts au public et la fourniture au public de services de communications électroniques sont soumis au respect de règles portant sur:

a) Les conditions de permanence, de qualité et de disponibilité du réseau et du service;

b) Les conditions de confidentialité et de neutralité au regard des messages transmis et des informations liées aux communications;

c) Les normes et spécifications du réseau et du service;

d) Les prescriptions exigées par la protection de la santé et de l'environnement et par les objectifs d'aménagement du territoire et d'urbanisme, comportant, le cas échéant, les conditions d'occupation du domaine public, les garanties financières ou techniques nécessaires à la bonne exécution des travaux d'infrastructures et les modalités de partage des infrastructures et d'itinérance locale;

e) Les prescriptions exigées par l'ordre public, la défense nationale et la sécurité publique, notamment celles qui sont nécessaires à la mise en oeuvre des interceptions justifiées par les nécessités de la sécurité publique, ainsi que les garanties d'une juste rémunération des prestations assurées à ce titre;

f) L'acheminement gratuit des appels d'urgence. A ce titre, les opérateurs sont tenus d'assurer l'accès gratuit des services d'urgence à l'information relative à la localisation de l'équipement du terminal de l'utilisateur, dans la mesure où cette information est disponible;

g) Le financement du service universel et, le cas échéant, la fourniture du service universel et des services obligatoires, dans les conditions prévues aux articles L. 35-2 à L. 35-5;

h) La fourniture des informations prévues à l'article L. 34;

i) L'interconnexion et l'accès, dans les conditions prévues aux articles L. 34-8 et L. 38;

j) Les conditions nécessaires pour assurer l'équivalence de traitement des opérateurs internationaux conformément aux dispositions du III du présent article;

k) Les conditions nécessaires pour assurer l'interopérabilité des services;

l) Les obligations qui s'imposent à l'exploitant pour permettre son contrôle par l'Autorité de régulation des communications électroniques et des postes et celles qui sont nécessaires pour l'application de l'article L. 37-1;

m) L'acquittement des taxes dues par l'exploitant pour couvrir les coûts administratifs occasionnés par la mise en oeuvre des dispositions du présent livre, dans les conditions prévues par les lois de finances;

n) L'information, notamment sur les conditions contractuelles de fourniture du service, et la protection des utilisateurs.

Un décret fixe les modalités d'application du présent article, notamment le contenu du dossier de déclaration, et précise, en tant que de besoin, selon les différentes catégories de réseaux et de services, les règles mentionnées aux a à n.

II. – Les opérateurs réalisant un chiffre d'affaires annuel sur le marché des communications électroniques supérieur à un seuil fixé par arrêté des ministres chargés des communications électroniques et de l'économie sont tenus d'individualiser sur le plan comptable l'activité déclarée.

En outre, lorsqu'ils disposent dans un secteur d'activité autre que les communications électroniques d'un monopole ou d'une position dominante appréciée après avis de l'Autorité de la concurrence, et que les infrastructures utilisées peuvent être séparées physiquement, ils sont tenus, dans l'intérêt d'un bon exercice de la concurrence, d'individualiser cette activité sur le plan juridique.

III. – Sous réserve des engagements internationaux souscrits par la France, le ministre chargé des communications électroniques et l'Autorité de régulation des communications électroniques et des postes veillent à ce que soit assurée l'égalité de traitement des opérateurs acheminant du trafic international au départ ou à destination de réseaux ouverts au public français, notamment dans les conditions d'accès aux réseaux français et étrangers.

Sous la même réserve, ils veillent également à ce que les opérateurs des pays tiers à la Communauté européenne assurent aux opérateurs déclarés en application du présent article des droits comparables, notamment en matière d'interconnexion et d'accès à ceux dont ils bénéficient sur le territoire national, en application du présent code.

IV. – Les installations mentionnées au 2° de l'article L. 33 sont soumises à déclaration dans les conditions prévues aux trois premiers alinéas du I du présent article et doivent respecter les règles mentionnées aux i et l du I.

Article L34-1

I.-Les opérateurs de communications électroniques, et notamment les personnes dont l'activité est d'offrir un accès à des services de communication au public en ligne, effacent ou rendent anonyme toute donnée relative au trafic, sous réserve des dispositions des II, III, IV et V.

Les personnes qui, au titre d'une activité professionnelle principale ou accessoire, offrent au public une connexion permettant une communication en ligne par l'intermédiaire d'un accès au réseau, y compris à titre gratuit, sont soumises au respect des dispositions applicables aux opérateurs de communications électroniques en vertu du présent article.

II.-Pour les besoins de la recherche, de la constatation et de la poursuite des infractions pénales ou d'un manquement à l'obligation définie à l'article L. 336-3 du code de la propriété intellectuelle, et dans le seul but de permettre, en tant que de besoin, la mise à disposition de l'autorité judiciaire ou de la haute autorité mentionnée à l'article L. 331-12 du code de la propriété intellectuelle d'informations, il peut être différé pour une durée maximale d'un an aux opérations tendant à effacer ou à rendre anonymes certaines catégories de données techniques. Un décret en Conseil d'Etat, pris après avis de la Commission

nationale de l'informatique et des libertés, détermine, dans les limites fixées par le V, ces catégories de données et la durée de leur conservation, selon l'activité des opérateurs et la nature des communications ainsi que les modalités de compensation, le cas échéant, des surcoûts identifiables et spécifiques des prestations assurées à ce titre, à la demande de l'Etat, par les opérateurs.

III.-Pour les besoins de la facturation et du paiement des prestations de communications électroniques, les opérateurs peuvent, jusqu'à la fin de la période au cours de laquelle la facture peut être légalement contestée ou des poursuites engagées pour en obtenir le paiement, utiliser, conserver et, le cas échéant, transmettre à des tiers concernés directement par la facturation ou le recouvrement les catégories de données techniques qui sont déterminées, dans les limites fixées par le V, selon l'activité des opérateurs et la nature de la communication, par décret en Conseil d'Etat pris après avis de la Commission nationale de l'informatique et des libertés.

Les opérateurs peuvent en outre réaliser un traitement des données relatives au trafic en vue de commercialiser leurs propres services de communications électroniques ou de fournir des services à valeur ajoutée, si les abonnés y consentent expressément et pour une durée déterminée. Cette durée ne peut, en aucun cas, être supérieure à la période nécessaire pour la fourniture ou la commercialisation de ces services. Ils peuvent également conserver certaines données en vue d'assurer la sécurité de leurs réseaux.

IV.-Sans préjudice des dispositions du II et du III et sous réserve des nécessités des enquêtes judiciaires, les données permettant de localiser l'équipement terminal de l'utilisateur ne peuvent ni être utilisées pendant la communication à des fins autres que son acheminement, ni être conservées et traitées après l'achèvement de la communication que moyennant le consentement de l'abonné, dûment informé des catégories de données en cause, de la durée du traitement, de ses fins et du fait que ces données seront ou non transmises à des fournisseurs de services tiers. L'abonné peut retirer à tout moment et gratuitement, hormis les coûts liés à la transmission du retrait, son consentement. L'utilisateur peut suspendre le consentement donné, par un moyen simple et gratuit, hormis les coûts liés à la transmission de cette suspension. Tout appel destiné à un service d'urgence vaut consentement de l'utilisateur jusqu'à l'aboutissement de l'opération de secours qu'il déclenche et seulement pour en permettre la réalisation.

V.-Les données conservées et traitées dans les conditions définies aux II, III et IV portent exclusivement sur l'identification des personnes utilisatrices des services fournis par les opérateurs, sur les caractéristiques techniques des communications assurées par ces derniers et sur la localisation des équipements terminaux.

Elles ne peuvent en aucun cas porter sur le contenu des correspondances échangées ou des informations consultées, sous quelque forme que ce soit, dans le cadre de ces communications.

La conservation et le traitement de ces données s'effectuent dans le respect des dispositions de la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.

Les opérateurs prennent toutes mesures pour empêcher une utilisation de ces données à des fins autres que celles prévues au présent article.

Article L34-8

I.-L'interconnexion ou l'accès font l'objet d'une convention de droit privé entre les parties concernées. Cette convention détermine, dans le respect des dispositions du présent code et des décisions prises pour son application, les conditions techniques et financières de l'interconnexion ou de l'accès. Elle est communiquée à l'Autorité de régulation des communications électroniques et des postes à sa demande.

Pour réaliser les objectifs définis à l'article L. 32-1, l'autorité peut imposer, de manière objective, transparente, non discriminatoire et proportionnée, les modalités de l'accès ou de l'interconnexion:

a) Soit de sa propre initiative, après avis de l'Autorité de la concurrence, consultation publique et notification à la Commission européenne et aux autorités compétentes des autres Etats membres de la Communauté européenne; la décision est adoptée dans des conditions de procédure préalablement publiées par l'autorité;

b) Soit à la demande d'une des parties, dans les conditions prévues à l'article L. 36-8.

Les décisions adoptées en application des a et b sont motivées et précisent les conditions équitables d'ordre technique et financier dans lesquelles l'interconnexion ou l'accès doivent être assurés.

II.-Les exploitants de réseaux ouverts au public font droit aux demandes d'interconnexion des autres exploitants de réseaux ouverts au public, y compris ceux qui sont établis dans un autre Etat membre de la Communauté européenne ou dans un autre Etat partie à l'accord sur l'Espace économique européen, présentées en vue de fournir au public des services de communications électroniques.

La demande d'interconnexion ne peut être refusée si elle est justifiée au regard, d'une part, des besoins du demandeur, d'autre part, des capacités de l'exploitant à la satisfaire. Tout refus d'interconnexion opposé par l'exploitant est motivé.

III.-Les opérateurs qui contrôlent l'accès aux utilisateurs finals peuvent se voir imposer des obligations en vue d'assurer le bon fonctionnement et l'interconnexion de leurs réseaux ainsi que l'accès aux services fournis sur d'autres réseaux.

IV.-Un décret fixe les modalités d'application du présent article, notamment les conditions générales et les principes de tarification auxquels les accords d'interconnexion et d'accès doivent satisfaire.

Article L36-7

L'Autorité de régulation des communications électroniques et des postes:

1° Reçoit les déclarations prévues à l'article L. 33-1 ;

2° Désigne les organismes intervenant dans la procédure d'évaluation de conformité prévue à l'article L. 34-9 ;

3° Contrôle le respect par les opérateurs des obligations résultant des dispositions législatives et réglementaires qui leur sont applicables en vertu du présent code, du règlement (CE) n° 717/2007 du Parlement européen et du Conseil du 27 juin 2007 concernant l'itinérance sur les réseaux publics de communications mobiles à l'intérieur de la Communauté et des autorisations dont ils bénéficient et sanctionne les manquements constatés dans les conditions prévues aux articles L. 36-10 et L. 36-11 ;

4° Détermine, selon les principes et les méthodes élaborés dans les conditions prévues à l'article L. 35-3, les montants des contributions au financement des obligations de service universel et assure la surveillance des mécanismes de ce financement;

5° Le cas échéant, définit des mesures d'encadrement pluriannuel des tarifs et émet un avis public sur la mise en oeuvre d'un tarif ou s'y oppose, en application des articles L. 35-2 et L. 38-1 ;

6° Assigne aux opérateurs et aux utilisateurs les fréquences nécessaires à l'exercice de leur activité dans les conditions prévues à l'article L. 42-1 et veille à leur bonne utilisation;

7° Etablit le plan national de numérotation téléphonique, attribue aux opérateurs les ressources en numérotation nécessaires à leur activité dans les conditions prévues à l'article L. 44 et veille à leur bonne utilisation;

8° Etablit la liste des opérateurs réputés exercer une influence significative sur un marché du secteur des communications électroniques et fixe leurs obligations, dans les conditions prévues aux articles L. 37-1 et L. 37-2.

Article L36-8

I.-En cas de refus d'accès ou d'interconnexion, d'échec des négociations commerciales ou de désaccord sur la conclusion ou l'exécution d'une convention d'interconnexion ou d'accès à un réseau de communications électroniques, l'Autorité de régulation des communications électroniques et des postes peut être saisie du différend par l'une ou l'autre des parties.

L'autorité se prononce, dans un délai fixé par décret en Conseil d'Etat, après avoir mis les parties à même de présenter leurs observations et, le cas échéant, procédé à des consultations techniques, économiques ou juridiques, ou expertises respectant le secret de l'instruction du litige dans les conditions prévues par le présent code. Sa décision est motivée et précise les conditions équitables, d'ordre technique et financier, dans lesquelles l'interconnexion ou l'accès doivent être assurés. Lorsque les faits à l'origine du litige sont susceptibles de restreindre de façon notable l'offre de services de communication audiovisuelle, l'autorité recueille l'avis du Conseil supérieur de l'audiovisuel qui se prononce dans un délai fixé par le décret en Conseil d'Etat prévu au présent alinéa.

L'Autorité de régulation des communications électroniques et des postes peut refuser la communication de pièces mettant en jeu le secret des affaires. Ces pièces sont alors retirées du dossier.

En cas d'atteinte grave et immédiate aux règles régissant le secteur des communications électroniques, l'autorité peut, après avoir entendu les parties en cause, ordonner des mesures conservatoires en vue notamment d'assurer la continuité du fonctionnement des réseaux. Ces mesures doivent rester strictement limitées à ce qui est nécessaire pour faire face à l'urgence.

L'autorité rend publiques ses décisions, sous réserve des secrets protégés par la loi. Elle les notifie aux parties.

II.-En cas d'échec des négociations commerciales, l'Autorité de régulation des communications électroniques et des postes peut également être saisie des différends relatifs à la mise en œuvre des obligations des opérateurs prévues par le présent titre, et le chapitre III du titre II, ainsi qu'à la mise en œuvre des dispositions de l'article 134 de la loi n° 2004-669 du 9 juillet 2004 relative aux communications électroniques et aux services de communication audiovisuelle, notamment ceux portant sur:

1° Les possibilités et les conditions d'une utilisation partagée entre opérateurs, prévue à l'article L. 47, d'installations existantes situées sur le domaine public et, prévue à l'article L. 48, d'installations existantes situées sur une propriété privée;

2° Les conditions techniques et financières de la fourniture des listes d'abonnés prévue à l'article L. 34 ;

2° bis La conclusion ou l'exécution de la convention d'itinérance locale prévue à l'article L. 34-8-1 ou de la convention d'accès prévue à l'article L. 34-8-3;

3° Les conditions techniques et financières de la mise en œuvre de l'utilisation partagée des infrastructures publiques de génie civil prévue à l'article 134 de la loi n° 2004-669 du 9 juillet 2004 précitée;

4° Les conditions techniques et tarifaires d'exercice d'une activité d'opérateur de communications électroniques ou d'établissement, de mise à disposition ou de partage des réseaux et infrastructures de communications électroniques visés à l'article L. 1425-1 du code général des collectivités territoriales.

Elle se prononce sur ces différends dans les conditions de forme et de procédure prévues au I. En outre, elle procède à une consultation publique de toutes les parties intéressées avant toute décision imposant l'utilisation partagée entre opérateurs des installations mentionnées au 1°.

III.-Les décisions prises par l'Autorité de régulation des communications électroniques et des postes en application des I et II peuvent faire l'objet d'un recours en annulation ou en réformation dans le délai d'un mois à compter de leur notification.

Le recours n'est pas suspensif. Toutefois, le sursis à exécution de la décision peut être ordonné, si celle-ci est susceptible d'entraîner des conséquences manifestement excessives ou s'il est survenu, postérieurement à sa notification, des faits nouveaux d'une exceptionnelle gravité.

Les mesures conservatoires prises par l'Autorité de régulation des communications électroniques et des postes peuvent, au maximum dix jours après leur notification, faire l'objet d'un recours en annulation ou en réformation. Ce recours est jugé dans le délai d'un mois.

IV.-Les recours contre les décisions et mesures conservatoires prises par l'Autorité de régulation des communications électroniques et des postes en application du présent article sont de la compétence de la cour d'appel de Paris.

Le pourvoi en cassation formé le cas échéant contre l'arrêt de la cour d'appel est exercé dans le délai d'un mois suivant la notification de cet arrêt.

V.-Lorsqu'une des parties est établie dans un autre Etat membre de la Communauté européenne et que le différend est également porté devant les autorités compétentes d'autres Etats membres, l'Autorité de régulation des communications électroniques et des postes coordonne son action avec celle de ces autorités. Les règles de procédure définies aux I et II sont applicables, à l'exception de celles qui sont relatives aux délais.

Décision no 97-455 du 17 décembre 1997 de l'Autorité de régulation des télécommunications portant adoption de lignes directrices sur les conditions d'accès aux câbles sous-marins

L'Autorité de régulation des télécommunications,

Vu les résultats de la consultation publique effectuée du 8 octobre au 5 novembre 1997;

Après en avoir délibéré le 17 décembre 1997,

Art. 1er. – Adopte les lignes directrices sur les conditions d'accès aux câbles sous-marins annexées à la présente décision.

Art. 2. – Le directeur général est chargé de l'exécution de la présente décision, qui sera publiée au Journal officiel de la République française.

Annex 3

A N N E X E

LIGNES DIRECTRICES SUR LES CONDITIONS D'ACCES

AUX CABLES SOUS-MARINS

Sur les objectifs poursuivis par l'Autorité

En matière de trafic international, l'action de l'Autorité de régulation des télécommunications s'articule autour de trois objectifs. Ces objectifs découlent des missions confiées à l'Autorité par le législateur, telles qu'elles ressortent notamment des articles L. 32-1, L. 33-1 et L. 34-1 du code des postes et télécommunications.

Il s'agit, en premier lieu, de veiller au libre exercice de la concurrence sur le marché français des services internationaux. L'Autorité a reconnu que la transition de ce marché vers un régime concurrentiel s'effectuerait sans doute plus rapidement que sur d'autres segments. Durant cette période de transition, l'Autorité souhaite s'assurer que l'ensemble des opérateurs puisse accéder dans des conditions équivalentes aux ressources nécessaires à la prestation de services internationaux.

Le développement de la France comme plate-forme d'acheminement de trafic international constitue un deuxième objectif de l'Autorité. Sur un marché mondial porté par une forte croissance, l'Autorité souhaite favoriser le développement de plate-forme reposant sur des noeuds de communication établis sur le territoire français. Sur ce marché, la compétitivité des acteurs établis en France aura des conséquences bénéfiques sur la balance commerciale, sur l'activité et sur l'emploi. Elle renforcera la position stratégique dont bénéficie aujourd'hui la France sur les principaux axes de communication internationaux. Enfin, elle induira des économies d'échelle dont pourront directement bénéficier les consommateurs français.

Ces deux objectifs en appellent un troisième: favoriser la transparence du cadre réglementaire actuel et renforcer la sécurité juridique dont bénéficient les acteurs du marché. La réalisation de ce troisième objectif contribuera aux deux premiers. Une lecture claire du cadre juridique applicable permettra à l'ensemble des acteurs de développer leurs activités dans les meilleures conditions, tant sur le marché français des services internationaux que sur celui des prestations de transit offertes aux opérateurs étrangers.

Sur les enjeux liés à l'accès aux systèmes de câbles sous-marins

A. – Enjeux techniques et économiques

L'acheminement de trafic international au départ et à destination de la France peut s'effectuer en ayant recours à plusieurs catégories d'infrastructures de transmission. Les infrastructures internationales utilisées peuvent schématiquement se regrouper autour de quatre types de support: les liaisons transfrontières terrestres, les faisceaux hertziens, les systèmes de câbles sous-marins et la capacité de segment spatial.

Chacun de ces modes de transmission présente des caractéristiques techniques spécifiques. En particulier, les réseaux par satellites et les systèmes de câbles sous-marins ne sont généralement pas jugés substituables, en raison notamment des délais de transmission, de l'existence d'effets d'écho ainsi que la dépendance aux conditions climatiques propres aux systèmes satellitaires. Les câbles sous-marins ne possèdent en revanche ni la souplesse de configuration, ni la capacité de diffusion point-multipoint propre aux systèmes de communications par satellites.

Parmi les différentes infrastructures utilisées pour l'acheminement de trafic international, la part que représentent les systèmes de câbles sous-marins est difficile à évaluer. Une analyse sommaire des flux de trafic – complétée par d'autres données – semble indiquer que près de 40 % du trafic international au départ et à destination de la France métropolitaine sont acheminés par l'intermédiaire de câbles sous-marins. Plusieurs facteurs semblent en outre annoncer un accroissement du rôle joué par ce mode de

transmission: les développements de la technologie de transmission par fibre optique, l'évolution des architectures des systèmes vers plus de fiabilité et plus de souplesse, la perspective d'une croissance de la capacité disponible ainsi que les effets du développement d'Internet sur la structure de la demande du marché français sont de nature à favoriser un recours accru aux câbles sous-marins.

B. – Enjeux concurrentiels

La plupart des systèmes de câbles sous-marins existants sont régis par des contrats de droit privé – dits accords de construction et maintenance – associant plusieurs exploitants de télécommunications. Ces accords précisent notamment: l'axe suivant lequel le câble est construit; la technologie utilisée; la capacité totale du système; la date de mise en service du câble; et les modalités contractuelles de participation au consortium. Ils associent non seulement les opérateurs de télécommunications situés à chaque extrémité de la liaison, mais également tout exploitant international dont les besoins de capacité justifient la participation. Dans la quasi-totalité des cas, cette participation n'est plus ouverte au-delà de la date de mise en service du câble.

A cette date, la capacité totale du système appartient en indivision aux membres du consortium. Elle se répartit entre, d'une part, la capacité à laquelle ont souscrit les copropriétaires pour satisfaire leurs besoins propres à court et moyen terme et, d'autre part, la capacité dite de réserve commune. Chacun des membres du consortium détient un certain nombre d'unités minimales d'investissement, qui portent sur des unités de capacité de 2 Mbit/s et déterminent ses droits de vote. Il peut accroître sa participation en souscrivant de nouvelles unités minimales d'investissement provenant de la capacité de réserve. Pour les opérateurs extérieurs au consortium, l'accès à cette capacité de réserve peut s'effectuer par acquisition de droits irrévocables d'usage, dont la validité s'étend sur toute la durée de vie du câble.

Les accords qui régissent les systèmes de câbles existants ont été conçus dans un environnement préconcurrentiel, avec le souci d'inciter les investisseurs potentiels à apporter une participation financière avant la date de mise en service du câble. A cette fin, ils peuvent contenir des dispositions opérant une différenciation nette entre copropriétaires et opérateurs extérieurs au consortium, notamment en matière d'accès à la capacité de réserve et de tarification. La structure juridique des systèmes de câbles sous-marins est donc susceptible d'agir comme barrière à l'entrée en créant une dissymétrie entre les entreprises déjà installées et les entrants potentiels.

Dans la perspective d'une ouverture totale à la concurrence au 1er janvier 1998, une telle dissymétrie pourrait induire des distorsions sur le marché français des services internationaux. L'existence de restrictions limitant l'accès des nouveaux entrants aux systèmes de câbles sous-marins existants est en effet susceptible de remettre en cause les conditions d'exercice d'une libre concurrence. Le cas échéant, de telles restrictions pourraient conduire les opérateurs à privilégier le recours à d'autres supports de transmission – capacité de segment spatial – ou à d'autres modes d'acheminement de trafic international – revente de minutes internationales commutées, offres de reroutage, liaisons louées internationales – sur la base de considérations autres que technique, économique ou financière. Elles pourraient également conduire des entrants potentiels à renoncer à leurs projets d'activité sur le marché français.

C. – Enjeux stratégiques

Les conditions d'accès aux systèmes de câbles sous-marins existants auront également une influence décisive sur le rôle de la France en tant que point nodal des principaux axes de transmission internationaux et sur sa capacité à exploiter pleinement ses atouts géographiques. L'existence de restrictions susceptibles de limiter l'accès aux capacités des câbles sous-marins atterrissant en France aurait pour effet d'inciter les nouveaux entrants à avoir recours à des infrastructures localisées à l'extérieur du territoire français et, par voie de conséquence, de contribuer au développement de plate-formes concurrentes d'acheminement de trafic international situées à l'étranger. Dans un contexte de bouleversement des modes d'acheminement de trafic international, elles contraindraient également les acteurs établis en France à réduire leurs ambitions sur le marché des prestations de transit offertes aux opérateurs étrangers.

En renforçant les noeuds de communication situés à l'extérieur du territoire français, cette situation pourrait, par ailleurs, mettre la France en marge des axes de déploiement des prochaines générations de systèmes de câbles sous-marins. Les conditions d'accès aux systèmes de câbles sous-marins existants détermineront en effet pour partie les demandes futures de capacité. Les nouveaux systèmes ne pourront en effet se développer à partir du territoire français en l'absence d'un niveau de participation suffisant de l'ensemble des opérateurs établis en France.

Sur la démarche de l'Autorité

Afin de répondre à ces enjeux, l'Autorité souhaite que l'ensemble des opérateurs puisse accéder dans des conditions équivalentes à la capacité disponible des systèmes de câbles sous-marins existantes. L'Autorité estime que la mise en oeuvre de ce principe contribuera, d'une part, à garantir les conditions d'exercice d'une libre concurrence sur le marché français des services internationaux et, d'autre part, à renforcer le rôle de la France comme plate-forme d'acheminement de trafic international.

L'Autorité souligne que cet objectif est pleinement conforme à la politique des autorités françaises eu égard aux conditions d'accès à la capacité de segment spatial de l'organisation internationale de télécommunications par satellites Intelsat. A cet égard, l'Autorité se félicite que plusieurs exploitants de réseaux ouverts au public bénéficient d'ores et déjà des modalités d'accès direct définies conjointement par les autorités françaises et France Télécom en juillet 1996.

L'Autorité souligne enfin que la problématique de l'accès aux systèmes de câbles sous-marins existants ne devrait se poser qu'à court terme. Elle escompte en effet que, lorsque de nouveaux systèmes se développeront au départ de la France, l'ensemble des opérateurs autorisés au titre de l'article L. 33-1 puisse notamment participer au financement du projet avant la date de mise en service du câble. Elle reconnaît également que de nouveaux systèmes se développeront en marge des structures juridiques traditionnelles propres aux consortiums, reposant sur une logique moins coopérative que commerciale.

Sur le cadre juridique applicable

A. – Qualification juridique des systèmes de câbles sous-marins

Les systèmes de câbles sous-marins atterrissant sur le territoire français constituent les éléments d'un réseau de télécommunications, défini par l'article L. 32 du code des postes et télécommunications comme étant:

« Toute installation ou tout ensemble d'installations assurant soit la transmission, soit la transmission et l'acheminement de signaux de télécommunications ainsi que l'échange des informations de commandes et de gestion qui y est associé, entre les points de terminaison du réseau. »

Dès lors que ces systèmes de câbles sont établis ou exploités pour la fourniture au public de services de télécommunications, l'entité assurant leur établissement et leur exploitation doit être autorisée au titre de l'article L. 33-1 du code des postes et télécommunications. Rien n'exclut cependant d'établir et d'exploiter un câble sous-marin dans le cadre du régime des réseaux indépendants, tel que défini par l'article L. 33-2 du code des postes et télécommunications.

D'autres autorisations peuvent s'avérer nécessaires, notamment en application du droit commun d'installation d'infrastructures situées sur le domaine public et dans les eaux territoriales françaises.

La détention de droits irrévocables d'usage portant sur les capacités d'un système de câble sous-marin ne requiert pas d'autorisation spécifique délivrée en application du code des postes et télécommunications. En particulier, les fournisseurs du service téléphonique au public autorisés en application de l'article L. 34-1, mais également les prestataires de services de télécommunications autres que le service téléphonique – par exemple les fournisseurs d'accès Internet – peuvent librement acquérir les droits irrévocables d'usage.

B. – Obligations applicables en matière de cession de droits irrévocables d'usage

En l'état actuel des dispositions réglementaires, les conditions d'acquisition de droits irrévocables d'usage portant sur des capacités disponibles des systèmes de câbles sous-marins ne sont évoquées expressément qu'au point 4o de l'article 8 du cahier des charges de France Télécom, approuvé par le décret no 96-1225 du 27 décembre 1996 portant approbation du cahier des charges de France Télécom. Celui-ci dispose que:

« Lorsque France Télécom est co-investisseur dans un câble sous-marin, elle fait droit sans discrimination aux demandes de droits irrévocables d'usage sur les capacités disponibles de ce câble, de la part d'opérateurs autorisés en application de l'article L. 33-1 du code des postes et télécommunications. France Télécom ne s'oppose pas à de telles demandes émanant des mêmes opérateurs lorsqu'elles sont adressées à tout autre organisme susceptible de donner accès aux capacités disponibles » (JO, 31 décembre 1996, p. 19687).

Dès lors que les capacités des systèmes de câbles sous-marins sont réputées constituer des ressources essentielles, au sens où cette notion est définie par la jurisprudence française, à savoir:

« Des installations ou des équipements indispensables pour assurer la liaison avec les clients et/ou permettre à des concurrents d'exercer leurs activités et qu'il serait impossible de reproduire par des moyens raisonnables » (arrêt de la cour d'appel de Paris, BOCC, 7 octobre 1997, p. 692), le droit commun de la concurrence pourrait sur ce point s'appliquer aux conditions de cession de droits irrévocables d'usage.

C. – Modalités d'intervention de l'Autorité

En matière d'accès aux systèmes de câbles sous-marins, les modalités d'intervention de l'autorité prévues par la loi sont au nombre de trois:

L'Autorité pourrait en premier lieu être amenée à intervenir dans le cadre des missions de contrôle que lui confère la loi, et notamment l'article L. 36-7 du code des postes et télécommunications qui dispose que:

« (L'Autorité) contrôle le respect par les opérateurs des obligations résultant des dispositions réglementaires qui leur sont applicables en vertu du présent code et des autorisations dont ils bénéficient et sanctionne les manquements constatés dans les conditions prévues aux articles L. 36-10 et L. 36-11 »;

L'Autorité pourrait, en second lieu, intervenir au titre de ses prérogatives en matière d'interconnexion et d'accès, telles que définies par les articles L. 34-8 et L. 36-8 du code des postes et télécommunications. Elle pourrait notamment être saisie d'un litige relatif aux conditions d'interconnexion aux stations d'atterrissement des câbles sous-marins. A ce titre, l'article D. 99-11 du code des postes et télécommunications, issu du décret no 97-188 du 3 mars 1997 relatif à l'interconnexion, dispose que les opérateurs tenus de publier une offre technique et tarifaire d'interconnexion:

« ... ne peuvent invoquer l'existence d'une offre inscrite au catalogue pour refuser d'engager des négociations commerciales avec un autre opérateur en vue de la détermination de conditions d'interconnexion qui n'auraient pas été prévues par leur catalogue, notamment les conditions d'accès aux commutateurs internationaux et à d'autres infrastructures internationales » (JO, 4 mars 1997, p. 3440).

Les stations d'atterrissement de câbles sous-marins font partie du champ des « infrastructures internationales » visées par le décret. Plus généralement, l'accès à ces stations relève du régime général de l'interconnexion, qu'il soit établi directement au niveau des équipements de tête de câble ou qu'il intervienne par le biais de liaisons de raccordement.

L'Autorité pourrait, en dernier lieu, intervenir selon les modalités fixées par le cahier des charges des exploitants de réseaux ouverts au public, telles que définies par le décret no 96-1175 du 27 décembre 1996 relatif aux clauses types des cahiers des charges associés aux autorisations attribuées en application des articles L. 33-1 et L. 34-1. La clause type relative aux conditions nécessaires pour assurer l'équivalence de traitement des opérateurs internationaux conformément aux dispositions des III et IV de l'article L. 33-1 – dite clause (n) – dispose que:

« Lorsque l'opérateur achemine du trafic téléphonique international en provenance ou à destination de pays où l'équivalence de traitement n'est pas assurée, soit directement, soit par l'intermédiaire d'un pays n'appartenant pas à l'Espace économique européen, et que l'Autorité de régulation des télécommunications constate, pour le trafic téléphonique entre la France et ce pays, que l'égalité des conditions de concurrence ne peut être préservée au bénéfice des autres opérateurs autorisés, l'opérateur peut être tenu, sur demande de l'Autorité de régulation des télécommunications, d'offrir aux opérateurs autorisés en application des articles L. 33-1 et L. 34-1 l'accès aux infrastructures de transmission et de commutation utilisées pour l'acheminement du trafic concerné, dans des conditions propres à rétablir l'égalité des conditions de concurrence. Les dispositions des articles L. 34-8 et L. 36-8 s'appliquent aux demandes formulées par les autres opérateurs et aux accords conclus dans ce cadre » (JO, 29 décembre 1996, p. 19440).

En application dudit décret, les conditions de mise en oeuvre de ce dispositif restent toutefois à préciser, notamment en ce qui concerne l'appréciation par le ministre chargé des télécommunications – sur proposition de l'Autorité – de l'équivalence de traitement, dans des conditions conformes aux engagements internationaux souscrits par la France. Sur ce point, l'Autorité communiquera ses propositions au ministre dans les mois qui viennent.

D. – Dimension communautaire

Sur le plan communautaire, le recours à la notion de « ressources essentielles » pourrait permettre d'encadrer les pratiques discriminatoires d'opérateurs européens n'ayant pas d'obligations spécifiques en matière de cession de droits irrévocables d'usage. Le projet de communication de la Commission no 97/C 76/06 du 11 mars 1997 relatif à l'application des règles de concurrence aux accords d'accès dans le secteur des télécommunications définit cette notion de ressources essentielles comme désignant:

« Des installations ou des infrastructures indispensables pour assurer la liaison avec les clients et/ou permettre à des concurrents d'exercer leurs activités, et qu'il serait impossible de reproduire par des moyens raisonnables » (JOCE, 11 mars 1997, no C 76/18).

Les règles communautaires de concurrence devraient donc permettre de s'assurer que les exploitants de télécommunications pourront accéder dans de bonnes conditions aux capacités des systèmes de câbles sous-marins contrôlées par des opérateurs établis au sein de l'Union européenne.

Sans faire l'objet d'une définition précise, le principe de non-discrimination – invoqué dans le cahier des charges de France Télécom – sous-tend l'ensemble de la législation ONP. Sur les conditions générales d'application de ce principe en droit communautaire des télécommunications, le cinquième considérant de la directive 92/44/CEE du Conseil du 5 juin 1992 relative à l'application de la fourniture d'un réseau ouvert aux lignes louées – modifiée par la directive 97/51/CE du Parlement européen et du Conseil du 6 octobre 1997 – précise que:

« Le principe de non-discrimination établi par le traité s'applique, entre autres, à la disponibilité de l'accès technique, aux tarifs, à la qualité de service, aux délais de fourniture, à la répartition équitable de la capacité en cas de pénurie, au temps de réparation, ainsi qu'à la disponibilité des informations concernant le réseau et des informations appartenant au client, sans préjudice des dispositions réglementaires applicables en matière de protection des données » (JOCE, 19 juin 1992, no L 165/27).

Sur l'approche retenue et le statut du présent document

Par l'adoption des présentes lignes directrices, l'Autorité entend préciser les conditions dans lesquelles elle pourrait être amenée à appliquer les dispositions juridiques relatives à l'accès aux systèmes de câbles sous-marins. Elle souligne que cette démarche de clarification des conditions d'application du cadre juridique répond aux attentes de nombreux opérateurs.

Les présentes lignes directrices n'ont aucun caractère réglementaire et n'introduisent aucune modification de l'état actuel du droit.

Cette approche apparaît aujourd'hui suffisante pour atteindre les objectifs souhaités. Toutefois, l'Autorité souligne que l'édiction de nouvelles dispositions réglementaires venant compléter le dispositif juridique actuel pourrait être ultérieurement envisagée si les évolutions du marché et les conditions d'exercice de la concurrence venaient à le justifier.

L'adoption des présentes lignes directrices ne prive pas l'Autorité de sa liberté d'appréciation. Elle conserve la possibilité de s'écarter des orientations définies, soit pour des motifs d'intérêt général, soit pour tenir compte de circonstances particulières.

Sur la lecture des dispositions applicables

A. – Conditions d'acquisition de droits irrévocables d'usage

Description de la situation existante

L'accès des opérateurs aux systèmes de câbles sous-marins existants s'effectue habituellement par acquisition de droits irrévocables d'usage, soit auprès du consortium, soit auprès d'un opérateur tiers. Elle fait normalement l'objet d'une convention de droit privé entre les parties, qui détermine les conditions techniques et financières de la cession.

L'acquisition de droits irrévocables d'usage portant sur des demi-circuits au départ de la France et l'activation desdits circuits ne peuvent d'ordinaire s'effectuer sans l'accord de l'opérateur situé à l'autre extrémité de la liaison.

Obligations figurant dans le cahier

des charges de France Télécom

Dans l'exercice des pouvoirs de contrôle que lui confèrent les articles L. 36-7, L. 36-10 et L. 36-11, l'Autorité est amenée à apprécier le respect par les opérateurs des dispositions législatives et réglementaires afférentes à leur activité. Ce sont les principes au vu desquels elle se livre à cette appréciation eu égard aux dispositions pertinentes du cahier des charges de France Télécom qui sont ici précisées.

Les obligations qui incombent à France Télécom en vertu de ces dispositions portent sur les systèmes de câbles atterrissant sur le territoire français. Elles ne semblent pas devoir trouver application pour les autres systèmes de câbles sous-marins, pour lesquels les conditions d'exercice de la concurrence ne justifient pas de soumettre France Télécom à des contraintes particulières. Elles ne semblent pas non plus devoir trouver application pour les systèmes à la participation desquels les opérateurs établis sur le territoire français pourront librement s'associer au-delà de la date du 1er janvier 1998.

L'exigence de non-discrimination inscrite dans le cahier des charges doit être comprise comme portant obligation pour France Télécom de faire droit aux demandes de droits irrévocables d'usage émanant de tout exploitant de réseau ouvert au public autorisé en application de l'article L. 33-1, dans des conditions équivalentes à celles consenties à ses propres services, filiales ou partenaires.

En conséquence, lorsque la capacité de réserve n'est pas épuisée, et sous réserve des engagements contractuels résultant de l'accord de construction et maintenance, ces dispositions portent obligation pour France Télécom de faire droit aux demandes de droits irrévocables d'usage portant sur cette capacité dans des conditions identiques à celles dont il bénéficie en tant que membre du consortium. Dans l'hypothèse où l'accord de construction et maintenance ne confère ni droits exclusifs ni conditions préférentielles aux co-propriétaires, les opérateurs tiers s'adressent directement au consortium.

Le principe de non-discrimination s'applique également aux droits irrévocables d'usage portant sur des capacités initialement acquises par France Télécom en vue de besoins propres mais dont elle ne souhaite plus faire usage.

Principe de non-discrimination

L'analyse du principe de non-discrimination, d'une part, les caractéristiques spécifiques aux capacités des systèmes de câbles sous-marins, d'autre part, conduisent à identifier quatre points au respect desquels l'Autorité veille particulièrement dans l'exercice de ses missions de contrôle: (i) conditions dont bénéficient les opérateurs tiers en matière d'accès aux informations; (ii) délais nécessaires à l'acquisition de droits irrévocables d'usage; (iii) conditions tarifaires; (iv) qualité des prestations de réparation et de maintenance.

i) Conditions d'accès aux informations.

L'Autorité veille à ce que, en réponse aux demandes raisonnables émanant d'opérateurs autorisés en application de l'article L. 33-1, les informations portant sur la capacité disponible soient fournies dans les mêmes conditions et avec le même degré de qualité que celles que France Télécom fournit à ses propres services, filiales ou partenaires. L'obligation de non-discrimination s'applique également aux informations obtenues par France Télécom au titre de sa participation au sein d'un consortium et, le cas échéant, non communiquées aux opérateurs détenteurs de droits irrévocables d'usage portant sur des capacités gérées par ce consortium;

ii) Délais nécessaires à l'acquisition de droits irrévocables d'usage.

L'Autorité veille à ce que l'exigence de non-discrimination inscrite dans le cahier des charges de France Télécom soit également respectée eu égard aux délais nécessaires à l'acquisition et à l'activation de droits irrévocables d'usage. L'Autorité estime, sur la base des informations recueillies dans le cadre de la consultation publique, que les références internationales disponibles permettent d'indiquer que les délais observés au cours du processus d'acquisition et d'activation de droits irrévocables d'usage sont de l'ordre: de trente jours calendaires pour le traitement des demandes; de trente jours calendaires pour la conclusion, le cas échéant, du contrat conférant à l'utilisateur les droits d'utilisation des capacités; de cinq semaines pour l'activation desdites capacités.

iii) Conditions tarifaires.

Dans le cadre de ses missions de contrôle, l'Autorité veille également à ce que les conditions tarifaires d'acquisition de droits irrévocables d'usage dont bénéficient les opérateurs respectent le principe de non-discrimination. Lorsque ces droits portent sur des capacités provenant de la réserve commune – et sous réserve des engagements contractuels résultant de l'accord de construction et maintenance -, les opérateurs doivent pouvoir bénéficier de conditions tarifaires identiques à celles proposées aux membres du consortium. Lorsque ces droits sont cédés par France Télécom à des opérateurs tiers, les conditions tarifaires présentées dans des conditions de marché équivalentes et correspondant à des demandes comparables doivent respecter le principe de non-discrimination. A cet égard, l'Autorité se fera communiquer les informations lui permettant de s'assurer que l'obligation de non-discrimination est bien respectée.

iv) Prestations de réparation et de maintenance.

L'Autorité veille enfin à ce que l'obligation de non-discrimination soit respectée eu égard aux services de réparation et de maintenance. La qualité et le coût de ces prestations conditionnent en effet les conditions d'acquisition de droits irrévocables d'usage.

B. – Conditions d'accès aux stations d'atterrissement des câbles sous-marins

L'acquisition de droits irrévocables d'usage et l'activation des capacités correspondantes ne peuvent être effectives que si les exploitants acquéreurs des droits sont à même d'acheminer leur trafic international jusqu'à la station d'atterrissement du câble sous-marin. Ceci requiert la conclusion de conventions fixant les conditions techniques et financières d'acheminement de ce trafic entre le réseau national de l'exploitant et ces stations.

Lesdites conventions relèvent du régime général de l'interconnexion. Au regard des expériences étrangères, deux modalités particulières d'interconnexion peuvent être mises en oeuvre:

La première s'effectue directement au niveau des stations d'atterrissement de câbles sous-marins. L'absence d'équipements de démultiplexage dans ces stations pourrait toutefois – au moins dans un premier temps – en limiter le caractère effectif.

Une deuxième option ouverte est la location de liaisons permettant de raccorder le réseau national de l'opérateur acquéreur de droits irrévocables d'usage aux stations d'atterrissement de câbles.

Dès lors que les prestations correspondantes ne sont pas inscrites au catalogue décrivant l'offre d'interconnexion d'un opérateur, les conventions font l'objet de négociations commerciales dans lesquelles l'Autorité n'a pas vocation à intervenir a priori. Il convient de rappeler que, en application de l'article L. 34-8 du code des postes et télécommunications, ces conventions devront être communiquées à l'Autorité. L'Autorité peut par ailleurs être saisie de différends relatifs à ces conventions conformément à l'article L. 36-8 du code des postes et télécommunications. Lorsque cela est indispensable pour garantir l'égalité des conditions de concurrence ou l'interopérabilité des services, l'Autorité peut également, après avis du Conseil de la concurrence, demander la modification des conventions déjà conclues.

INDIA

The Telecommunication Tariff (Thirty Ninth Amendment) Order, 2005

2. In the Telecommunication Tariff Order, 1999:-

(i) In Clause 3, the number 'X' shall substitute the number 'IX' appearing after the word and number 'Schedule I to'; and,

(ii) After Schedule IX, the following new schedule shall be inserted, namely: –

Schedule X

International Private Leased Circuit (IPLC)-(Half Circuit)

ITEM	TARIFF
(1) Date of implementation	16.09.2005
(2) Coverage	(a) All tariffs specified as ceilings (b) The ceiling tariff in respect of each capacity specified in Item No.3 of this Schedule will be applicable for all destinations and types of cable systems used for carrying either voice or data. (c) Service providers may offer discount on the ceiling tariff. Discounts, if offered, shall be transparent, non-discriminatory based on laid down criteria and should be reported to TRAI. (d) It is mandatory for International Private Leased Circuit Service Providers to offer Half Circuits for all routes/destinations for which circuits are offered by them.
(3) Tariff for IPLC	**Capacity/Speed Ceiling Tariff per annum (Rupees in Lakhs)** E1 13 DS-3 104 STM-1 299
(4) Tariff for capacity/ speed below E1	Forbearance
(5) Tariff for IPLC through satellite media	Forbearance
(6) All other matters relevant to IPLC	Forbearance

International Telecommunication Access to Essential Facilities at Cable Landing Stations Regulation, 2007

3. Provision of access to cable landing station and related international submarine cable capacity by owner of cable landing station.

(1) Every owner of cable landing station shall, in respect of its each cable landing station,

(a) provide, on fair and non-discriminatory terms and conditions, at its cable landing station, access to any eligible Indian International Telecommunication Entity requesting for accessing international submarine cable capacity on any submarine cable systems;

(b) interconnect specified international submarine cable landing at its cable landing station in India in accordance with the provisions of these regulations;

(c) provide landing facilities for submarine cables at its cable landing station to a service provider, who has been granted licence to act as an International Long Distance Operator under the licence;

(d) submit to the Authority, within thirty days from the date of commencement of these regulations, a document containing the terms and conditions of Access Facilitation and Co-location facilities including landing facilities for submarine cables at its cable landing stations for specified international submarine cable capacity in accordance with the provisions of these regulations (hereinafter referred to as the "Cable Landing Station-Reference Interconnect Offer") for approval of Authority:

Provided that in case of a cable landing station which comes into existence after commencement of these regulations, the owner of such cable landing station shall submit, on or before the date of coming into existence of such cable landing station, the Cable Landing Station-Reference Interconnect Offer in respect of such cable landing station to the Authority for its approval.

(2) Every Cable Landing Station-Reference Interconnect Offer including co-location charges shall be prepared in accordance with the Schedule appended to these regulations for submitting the same under sub-regulation (1) to the Authority for its approval.

(3) The Authority shall approve the Cable Landing Station-Reference Interconnect Offer within sixty days from the date of its submission under sub-regulation (1) to the Authority:

Provided that in case the Authority is of the opinion, that the Cable Landing Station-Reference Interconnect Offer requires modifications so as to protect the interests of service providers or consumers of the telecom sector, or to promote or ensure orderly growth of the telecom sector or the Cable Landing Station-Reference Interconnect Offer has not been prepared in accordance with the provisions of these regulations, it may, after giving an opportunity of being heard to the concerned owner of the cable landing station, require such owner to modify the said offer submitted by him and such owner shall make such modifications and submit, within fifteen days of receipt of requirement for the modifications, the said offer after incorporating such modifications, for approval to the Authority.

(4) Every owner of a cable landing station shall publish, on its website and in such other manner as the Authority may specify, within fifteen days from the date of approval of the Cable Landing Station-Reference Interconnect Offer by the Authority, the Cable Landing Station-Reference Interconnect Offer so approved by the Authority and forward a copy thereof to the Authority along with a confirmation to the effect that such offer had been published in accordance with the offer so approved by the Authority and in the manner specified in this sub-regulation.

(5) Every owner of cable landing station, desirous of making any modification to its Cable Landing Station-Reference Interconnect Offer published under sub- regulation (4), shall submit all such modifications in such Cable Landing Station-Reference Interconnect offer for prior approval of the Authority.

(6) All the provisions of these regulations, which apply for approval of the Cable Landing Station-Reference Interconnect offer, shall, mutatis mutandis, apply to the modifications to the Cable Landing Station-Reference Interconnect offer approved by the Authority under sub-regulation (3).

8. Ensuring provision of backhaul circuit by eligible Indian International Telecommunication Entity.

(1) Every eligible Indian International Telecommunication Entity shall arrange, within ten days after entering into an agreement under sub-regulation (1) of regulation 6, for backhaul circuit from

(a) the owner of the cable landing station; or

(b) a service provider who has been granted licence to provide basic service or cellular mobile telephone service or national long distance service, or international long distance service, so as to make ready the backhaul circuit between cable landing station and the premises of the eligible Indian International Telecommunication Entity.

(2) The owner of the cable landing station and the eligible International Telecommunication Entity shall conduct necessary tests as per mutually agreed testing procedure so that that the backhaul circuit remains in a state of readiness for interconnection before the tests for Reference Capacity provisioning are carried out.

(3) The owner of the cable landing station shall facilitate the interconnection between the eligible Indian International Telecommunication Entity and the service providers referred to in clauses (a) and (b) of sub-regulation (1) at the cable landing station for provisioning of backhaul circuit under sub-regulation (1).

17. Allocation of alternative Co-location space.

(1) In case the owner of cable landing station is unable to offer, due to space limitations or any other valid reason, the physical Co-location requested for by the eligible Indian International Telecommunication Entity, the owner of the cable landing station shall take reasonable measures to give an options of virtual Co-location to enable such eligible Indian International Telecommunication Entity to have Access Facilitation:

Provided that in case the owner of cable landing station is unable to offer Co-location space at cable landing station and the eligible Indian International Telecommunication Entity fails to arrange a Virtual Co-location site, then the owner of cable landing station shall endeavour to provide an alternate site other than the Virtual Co-location.

(2) The charges relating to alternate site for Co-location and interconnecting link to the cable landing station shall be borne by the eligible Indian International Telecommunication Entity.

(3) In case an eligible Indian International Telecommunication Entity is offered, due to space constraints at cable landing station or any other valid technical reason, a Virtual Co-location facility by the owner of the cable landing station, in that case the owner of the cable landing station shall make available required elements including duct within the building for the purpose of running an interconnection cable within the cable landing station for which the charges shall be payable and borne by eligible Indian International Telecommunication Entity.

(4) The eligible Indian International Telecommunication Entity shall arrange the telecommunication link from Virtual Co-location Site to cable landing station, cost of which shall be borne by such eligible Indian International Telecommunication Entity.

SINGAPOURE

Code of Practice for Competition in the Provision of Telecommunication Services, 2005

5.3 Duty to Submit to IDA All Interconnection Agreements

(*a*) Licensees must submit to IDA a copy of all Interconnection Agreements into which they enter.

(i) Where one of the parties is a Dominant Licensee, the Licensees must provide that their Interconnection Agreement will not be effective until approved by IDA.

(ii) Where neither party is a Dominant Licensee, the Licensees may provide that their Interconnection Agreement will be effective upon submission to IDA. If the Licensees include such a provision, they must further provide that the Interconnection Agreement will remain effective unless IDA informs the Licensees in writing, within 21 days of the date of submission, that it rejects the Interconnection Agreement. If the Licensees do not want to include the above provisions, they must provide that their Interconnection Agreement will not be effective until approved by IDA.

(*b*) IDA will not publicly disclose Interconnection Agreements between Non-dominant Licensees.

MAURITIUS

Information and Communications Technologies Act 2001

31.

Tarifs

(1) Every public operator shall provide the Authority with a tariff of its charges for every information and communication service including telecommunication service which he proposes to supply and of every intended alteration of those charges in a form approved by the Authority, and in compliance with the requirements of this section.

(2) Every tariff shall include information relating to –

(a) the term during which the tariff is to apply;

(b) the description of the service;

(c) the amount of the charges payable for each service including the amount of any surcharge that may be imposed as a result of non-payment of fees or charges and the cost-related computation thereof;

(d) the quantity in which the service is supplied;

(e) the transmission capacity needed to supply the service;

(f) the performance characteristics for the service supplied; and

(g) the terms and conditions on which the service is supplied.

(3)

(a)

(b) On receipt of a tariff in accordance with subsection (1), the Authority shall within 180 days or such shorter period that may be prescribed, determine whether to allow, or to disallow, or to amend the tariff and shall, in so doing, have regard, inter alia, to the just and reasonable nature of the charges set out therein.

The Authority shall forthwith give public notification in 2 daily newspapers of every determination made pursuant to paragraph (a).

(4) Every public operator shall supply to the Authority Such information relating to the proposed tariff as the Authority considers necessary or desirable to enable the Authority to monitor compliance with this Act.

(5) Every public operator shall, at each of his business offices, make available for inspection and purchase a copy of every tariff.

(6) The Authority may, by notice in writing to a public operator, disallow any tariff which does not comply with this Act or with any condition of his licence.

(7) (a) Where the Authority is of opinion that the operation of a tariff by a dominant operator would have an anti- competitive effect in any market for any information and communication service, including telecommunication service, it shall, by notice in writing, inform the dominant operator that it is disallowing the tariff, and of the reasons for which it does so.

(b) For the purposes of paragraph (a), the operation of a tariff shall be deemed to have an anti-competitive effect in a market if, and only if, the operation or continued operation of the tariff, whether or not in conjunction with other tariffs or commercial arrangements, has, or is likely to have, the effect of materially and adversely affecting the development or maintenance of commercially sustainable competition in that market.

(8) No public operator shall demand or receive from any person payment of any fee or charge for the supply of a service which – exceeds the fee or charge payable under the appropriate tariff; is not worked out or computed in accordance with the appropriate tariff; or is worked out or computed in accordance with a tariff which has been disallowed pursuant to subsection (6) or (7).

Annex 4

Annex 4: International legal and regulatory references' matrix

WATRA members	Authorisation and Licensing Agreements
Benin: *Ordnance 2002-02*	**Article 9** defines Restrictive Practices. **Article 10** defines abuse of dominant position**. Article 11** defines anti-competitive practices.
Benin: *Annex 2*	**Clause J:** The regulator has to ensure effective competition. **Clause Y** specifies that the regulator promote regional connectivity.
Benin: *Decret 2008-507*	**Article 11** specifies that the Cahiers des charges will specify the conditions of interconnexion and the conditions for sharing infrastructure. **Article 32** forbids the use of WiMAX by private operators.
Burkina Faso*: Loi 15/94*	This law sets up the Competition Commission.
Burkina Faso*: Loi 059-98*	This law says that competition must be "saine et loyale" and that public networks must operate in a manner that is "transparentes et non discriminatoires" **Chapter 4** covers Interconnexion in some detail but largely from a national perspective. **Article 49** covers anti-competitive practices.
Burkina Faso: *Decret 2000-159*	**Articles 1 and 2** define the monopoly of ONATEL.
Burkina Faso: *Decret 2002-692*	portant modification de la loi n° 15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso.
Burkina Faso: *Loi 061-2008*	**Article 64** covers the terms of interconnection. **Article 65b:** l'obligation de fournir l'accès à des ressources spécifiques, dans des conditions équitables, raisonnables et non discriminatoires, aux opérateurs, dans la mesure de ce qui est nécessaire pour assurer l'accès des utilisateurs finals à des services spécifiés par voie règlementaire. **Articles 71, 74, 75 and CHAPITRE III : CO-LOCALISATION ET PARTAGE DE RESSOURCES, Articles 144 and 145:** These all cover national interconnection in some detail and specify non-discriminatory, etc.
Cape Verde: Decreto Legislativo 7/2005	A general statement on access.
Cote d'Ivoire: *Loi 95-526*	**Definition 16** provides a definition of what is covered by the term submarine cable. **Article 4** covers "concurrence loyale", equal treatment of users and transparent and non-discriminatory.
Cote d'Ivoire: *Decret 97-391*	**Item V and Section 111** cover interconnection issues.
Cote d'Ivoire: *Loi 97-393*	**Article 18** covers interconnection of services.
Cote d'Ivoire: *Decret 2004-91*	This decree specifies the end of the monopoly for Cote d'Ivoire Telecom.
Cote d'Ivoire: *Decret 2005-17*	This decree describes the Arobase concession.
Cote d'Ivoire: *Cahiers de Charges Operateurs Mobiles*	The regulator's **Cahiers du Charge Operateurs Mobiles** specifies international gateway licences from 2004 and interconnection agreements entered into freely by operators.
Gambia: *Information and Communications Act 2009*	The **principles section (4)** says the regulator will prevent any distortion or restriction of competition. **Part 6, item 4** details what Fair Competition means. **Part 5, item 38** outlines how the sharing of facilities will operate.
Ghana: *National Communications Regulations 2003*	**General principles** specify non-discriminatory (**section 3**) and fair competition (**section 4**). **Part VI. And item 112** sets timeline for interconnect negotiations. **Use of Open Architecture Design** specifies the use of open architecture technology. **Section 25:** Interconnection of border areas:"…with prior written approval of the authority, enter into special interconnection agreements with persons providing the same services located within areas of a neighbouring country."
Guinea:	There appear to be no relevant clauses in the documents obtained.
Guinea Bissau	No documents obtained. There is a currently operating Communications Act that is waiting to be replaced by another version.
Liberia: *Telecoms Act 2007*	**Section 27, 29, 30 and 31, Part VIII:** These sections cover competition, determining anti-competitive practices and remedies for anti-competitive practices.Part VIII covers interconnection.
Liberia: *Draft Telecoms Act 2009*	**Article 18.1** specifies the principle of equal network access. **Section 26** encourages and promotes the sharing of infrastructure.
Mali: *Loi N° 01-005 1999*	**Article 17:** This is an amendment to an earlier law and provides a framework for interconnection.
Mali*: Ordnannce 99-043*	**Section 2, Article 17** covers the same ground as Loi No 01-005-1999.

Annex 4

Mali: *Decret N° 00-226*	It mentions in one line that conditions of access are something that will be covered.
Mali: *Decrets 00-229 and 00-230*	**Decret 229 – Articles 2-6** outline the terms for sharing infrastructure. **Decret 230 - Chapter 2: Articles 3 and 5. Article 8. Section 4, Article 12:** This covers the terms of interconnection. Article 8 covers interconnection contracts. **Section 4**, **Article 12** cover non-discrimination.
Mali: *10.6 Politique Sectorielle*	**IV.1 Ouverture du secteur** covers sharing infrastructure and interconnection.
Mauritania: *Loi N° 99-019 1999*	**Section 3 and article 42** provide a framework for interconnection.
Mauritania: *Decret 2000/128/PM/MIPT/*	**Chapter 2, Article 3** opens the market up to competition.
Mauritania: *Decret 2000.163 2000*	This provides a framework for interconnection.
Mauritania: *Decision 007/09/AR/CNR/PR*	A regulator decision on an interconnect dispute between Mattel and Chinguetel.
Mauritania: *Interconnexion Agreement: Mattel*	An interconnect agreement for one of the operators, Mattel.
Niger: *Ordnannce 99-045*	**Articles 12 and 14** cover restrictive practices and control of anti-competitive practices.
Niger: *Decret 2000-399*	**Articles 3, 4 and Titre III:** Article 4 specifies time for interconnect offer response and right of appeal to the regulator. **Article 9** references the requirement for links to neighbouring countries to be part of the regional plan.
Niger: *Cahiers du charge mobile*	**Article 8.3** covers international links, particularly that the conditions uner which they are offered conform to the rules and recommendations of international bodies to which Niger is a member.
Nigeria: *Communications Act 2003*	This is the act that sets up the regulator NCC and lays out the general framework of regulation.
Nigeria: *Guidelines on Collocation and Infrastructure Sharing*	**Article 3:** c) References fair competition through equal access; and d) that the economic advantages from sharing will be "overall benefits of all telecoms stakeholders.
Nigeria: International Data	
Nigeria: *International Data Access Gateway Licence*	**Articles 3.2, 3.3 and 5.1:** These articles cover Undue Preference and Undue Discrimination. Article 5.1 prohibits anti-competitive conduct.
Nigeria: *International Gateway Licence*	**Articles 9.1, 21.1: Article 9.1** covers the Prohibition of Anti-Competitive Behaviour:"…in the opinion of the Commission (that) has the purpose or effect of promoting or substantially limiting, restricting or distorting competition. **Article 21.1** says interconnection must abide by principles of neutrality, non-discrimination and equality of access. This article covers reasons for not entering into an interconnect agreement. It presents a much more limiting and negative framework with reasons to say "no" including technical limitations, safety, etc
Nigeria: *Metro Fibre Network Licence*	**Articles 4.1-4.3:** This article covers reasons for not entering into an interconnect agreement. It presents a much more limiting and negative framework with reasons to say "no" including technical limitations, safety, etc. **Article 4.3** allows terms and conditions that are preferential if lodged with and approved by the regulator.
Nigeria: *National Long Distance Carrier Licence*	**Section 4** covers Undue Preference and Undue Discrimination and **section 6** covers anti-competitive conduct.
Senegal: *Loi 94-63*	**Loi 94-63** covers the setting up of the Competition Commission.
Senegal: *Loi 2001-15*	**Principles, Articles 5 and 23:** The principles include: la transparence, la concurrence saine et loyale et l'interconnexion equitable des reseaux. Article 5 deals with anti-competitive advantages inherited from the period before the end of the monopoly and "l'abus de position dominante."
Senegal: *Loi 2002-23*	**Chapitre IV, Articles 21 and 22:** Article 21 covers Pratiques anticoncurrentielles and Article 22 Abus de position dominant.
Senegal: *Tableaux Interconnexion*	A table from the regulator comparing Senegalese legislation and regulation on interconnexion with the CEDAO equivalents with recommendations for changes.
Sierra Leone: *Telecoms Act 2006*	This is the main piece of legislation covering the framework for regulation.
Togo: *Loi 98-005*	**Articles 14, 34 and 35**: Article 14 specifies interconnection "…dans conditions objectives, transparentes et non-discriminatoires." Article 34 covers anti-competitive practices and article 35 abuse of dominant position.
Comparators	

Annex 4

***Kenya**: Kenya Info and Comms (Fair Competition and Equality of Treatment) 2010*	**Article 11** details obligations on licencees for interconnection.		
***Kenya:** Kenya Info and Comms (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010*	**Article 4** details Rights and Obligations to interconnect.		
***NEPAD:** Kigali Protocol*	**Article 2** outlines the onjectives of the Protocol:"To promote and facilitate the provision of broadband ICT infrastructure…etc". **Article 3** covers General Undertakings which looks at Government's responsibilities to help and facilitate.		
***South Africa:** Electronic Communications Act 2005*	**Article 8** covers Terms and Conditions for Licencees. **Item 8, Terms and Conditions for Licences** (e) the public interest in ensuring service interoperability, non-discrimination and open access, interconnection and facilities leasing; m) the public interest in facilitating and maintaining a competitive electronic communications environment and in regulating and controlling anti-competitive practices; **Articles 37** covers Obligation to Interconnect and **article 38** regulations and principles covering interconnection.		
	Access/Interconnection		
***Benin:** Annexe 2, Latest Telecoms Act*	**Article 190** (amended): (a) la faculté d'exiger la modification des clauses inéquitables des contrats conclus avec des utilisateurs ou des conventions régissant l'interconnexion ou l'accès au réseau des opérateurs ;		
***Gambia:** Information and Communications Act 2009*	**Item 54** covers infrastructure sharing and access and interconnection. **Part 3, item 2** says only retrospectively granted exclusivity periods can be included in new licences. **Item 65** covers the content of interconnection agreements. **Item 21** specifies that operators have an obligation to provide co-location. **Item 69** covers points of interconnection (POPs).		
***Senegal:** Loi 2001-15*	**Article 12** covers co-location"…de la disponibilite de l'espace necessaire et de la pris en charge d'une part raissonable des frais d'occupation des lieux."		
Comparators			
***Kenya:** Kenya Info and Comms (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010*	**Article 10** is a rare reference to Quality of Service.**Article 14** deals with Points of Interconnection. **Article 18 (which comes after 19)** deals with Network Access and **Article 19** with collocation.		
***NEPAD:** Kigali Protocol*	**Article 16** covers Access to Undersea and Terrestrial Broadband and Fibre Optic Cable Systems.		
	Monopoly / Market Power		
	Anti-competitive practices and definition of operators with significant market power	Functional separation	Essential facilities
***Burkina Faso:** Loi 059-98*	**Articles 50 and 51** cover dominant market power.	**Section 6, Article 81:** This articles specifies that the regulator can instigate functional separation.	
***Gambia:** Information and Communications Act 2009*	**Part 3, item 2** says only retrospectively granted exclusivity periods can be included in new licences. **Item 48** covers significant market power and how it will be dealt with. **Part 4, item 33, (2**) specifies the use of cost-oriented pricing based on cost calculations.	.	
***Ghana:** National Communications Regulations 2003*			**Section 4**: "…a network or other essential facility…"(our underlining)
***Liberia:** Draft Telecommunications Act 2009*	**Article 19.1** deals with how to address dominant service providers.		
***Mali**: Decret 00-230*	**Section 1: definitions** refers to "operateur puissante" and who this refers to will be decided by the Ministry.		
***Mauritania:** Decret 2000.163*	**Titre 1: Principes Generaux** defines the dominant operator as one that has more than 25% market share.		
***Niger:** Ordnannce 99-045*	**Article 13** covers abuse of dominant position.		

Annex 4

Niger: *Decret 2000-399*	**Definitions and Article 3:** Dominant operator is defined as having more than 30% of market share and article 3 specifies that Sonitel's monopoly ends 31 December 2004.		
Nigeria: *Determination on dominance*	The Determination on dominance found no dominance in the international fibre sector by the time 4 new cables arrive but notes that the NCC's "telecommunications regulatory framework provides specific remedies to deal with substantiated cases of anti-competitive conduct. In most cases, these remedies can be implemented without a finding of dominance".		
Nigeria: *International Data Access Gateway Licence*	**Article 4.1** prohibits cross-subsidies between different activities. **Article 8.1** specifies separate accounts for all activities with separate accounting records.		
Nigeria: *International Gateway Licence*	**Article 5.1:** This article specifically covers the actions of resellers and agents which are not covered elsewhere.		
Nigeria: *National Long Distance Carrier Licence*	**Section 5** covers the prohibition of cross-subsidies.		
Senegal: *Loi 94-63*	**Article 27** specifically outlaws the abuse of dominant position by a company.		
Senegal: *Loi 2001-15*	**The Expose des Motifs** says:"…la liberalization a courte terme et l'access a l'international en 2004". **Article 37** defines "position dominante" as those having a market share of 25% or more of the telecoms market.		
Sierra Leone: *Telecoms Act 2006*	Under the Act, the international gateway is the monopoly of the incumbent Sierratel. This may change in the near future.		
Comparators			
Kenya*: Information and Communications (Fair Competition and Equality of Treatment 2010)*	**Articles 8 and 9** deal with dominant market power and how it will be addressed.		
South Africa: *Electronic Communications Act 2005*	**Article 67** deals with Undue Preference and Undue Discrimination and how to deal with dominant market power.		**A definition** is provided for Essential Facility and **Chapter 8 Electronic Communications Facilities Leases** specifically outlaws exclusivity agreements and restrictive practices. Essential facility definition: 'essential facility'' means an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act;

	Implementation
***Cote d'Ivoire**: Loi 95-525*	**Article 49** covers the use of a Tribunal to adjudicate seaboard cable breaks in national waters.
***Gambia**: Information and Communications Act 2009*	**Part X, Item 22** covers how interconnection disputes will be handled.
***Ghana:** National Communications Regulations 2003*	**Section 113** specifies resolution of disputes by regulator and **Part VIII** specifies resolution processes.
***Mali:** Decret 00-229*	**Article 6** says that in event of irreconcilable differences between those wanting to share infrastructure, the regulator will act as referee.
***Mali:** Decret 00-230*	**Chapter 3, Article 6** describes the Reference Interconnect Offer required of "operateurs puissantes".
***Mauritania:** Decret 2000.163*	There is an **annex** detailing the arbitration procedure, including a flow chart of actions.
***Mauritania:** Decision 007/09/AR/CNR/PR*	The **decision** provides a ruling on interconnection sharing issues. There are two other decisions included amongst the background documents.
***Nigeria:** International Gateway Licence*	**Article 21.2** provides timelines for the resolution of operator disputes.
Comparators	
***Kenya**: Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilities) Regulations 2010*	**Article 22** deals with dispute resolution.

Annex 5

Annex 5: West African set of articles mentioned in the matrix

Documents analysed in country order

Guinea Bissau is missing

1. Benin

1.1 Ordonnance n°2002-02 du 31 janvier 2002 portant principe fondamentaux du régime des Télécommunications en République du Benin

In the context of setting out the powers of the regulator, the following are relevant:

Définitions :

…

22. Services d'interconnecion : les prestations réciproques offertes par deux exploitants de réseaux ouverts au public qui permettent à l'ensemble des utilisateurs de communiquer librement entre eux, quels que soient les réseaux auxquels ils sont raccordés ou les services qu'ils utilisent.

…

Article 9 defines restrictive practices.

Article 10 is related to Abuse of Dominant Position.

Article 11 the control of anti-competitive practices.

1.2 Annexe

Undated but it covers the setting up of the regulator.

….

(j) assurer l'encouragement et le maintien d'une concurrence effective ainsi qu'un marché juste et efficace entre les entités engagées dans l'industrie des communications électroniques et de la poste en tenant dûment compte de l'intérêt public et, en veillant à ce que la concurrence ne soit pas faussée ni entravée dans le secteur des communications électroniques et de la poste;

(y) promouvoir la connectivité régionale des communications électroniques…

1.3 Décret n°2008-507 du 8 septembre 2008 portant conditions d'acceptation et d'attribution des autorisations, des permis et des déclarations préalables pour l'expolitation des réseaux ou services de télécommunications en République du Bénin

Article 11 specifies that the Cahiers des charges will specify the conditions of interconnexion and the conditions for sharing infrastructure.

Article 11 : Chaque type de cahier des charges doit indiquer notamment :

…

7 – Exploitants d'infrastructures alternatives : Les personnes morales de droit publis et les sociétés concessiooaires de service public disposant d'infrastructures ou de droits pouvant supporter ou contribuer à supporter des réseaux de communications électroniques, sans qu'elles puissent exercer par elles-mêmes les activités d'exploitant de réseaux de communications électronqiues ouverts au public.

…

1.4 Décret n°2008-780 du 31 décembre 2008 portant approbation du Document de Politique et de Stratégie du secteur des Téécommunications, des Technologies de l'information et de la Communication et de la Poste.

Article 1er : Est approuvé, le Document de Politique et de Stratégie de secteur des Télécommunciaitons, des Technologies de l'information et de la Communication et de la Poste tel qu'il figure en annexe à ce decret.

2. Burkina Faso

2.1 Loi 15/94 du 5 mai 1994 portant organisation de la concurrence au Burkina Faso

Article 1er

Les prix des produits, des biens et des services sont libres sur toute l'étendue du territoire et déterminés par le seul jeu de la concurrence.

Article 2

Il est institué une Commission nationale de la concurrence et de la consommation. La Commission nationale de la concurrence et de la consommation est un organe consultatif.

Article 3

La Commission nationale de la concurrence et de la consommation est saisie à l'initiative de l'administration pour les questions suivantes:

- sur toutes les questions concernant la concurrence et la consommation notamment les textes pris en application de la présente loi;
- sur les pratiques anticoncurrentielles et restrictives de la concurrence relevées dans les affaires dont les juridictions compétentes sont saisies;
- sur les faits qui lui paraissent susceptibles d'infraction au sens de la présente loi.

The Act defines both the Competition Commission and the conditions of anti-competitive behaviour.

2.2 Loi n° 051/98/AN portant réforme du secteur des télécommunications au Burkina Faso

Article 4:

L 'Etat est le garant d'une concurrence saine et loyale dans le secteur des télécommunications.

A cet égard, il veille à ce que:

….

d) l'accès aux réseaux ouverts au public soit assuré dans les conditions objectives, transparentes et non discriminatoires.

Definitions

…

12) Interconnexion:

a) les prestations réciproques offertes par deux exploitants de réseaux ouverts au public permettant à l'ensemble de leurs utilisateurs de communiquer librement entre eux, quel que soit le réseau auquel ils sont raccordés;

b) les prestations d'accès au réseau ouvert au public offertes dans le même cadre par son exploitant à un prestataire de service de télécommunication.

…

Chapitre IV: Interconnexion

Article 20:

1- Les opérateurs de réseaux ouverts au public font droit, dans des conditions objectives, transparentes et non discriminatoires, aux demandes d'interconnexion des titulaires d'une autorisation délivrée en application des articles 10 et 11 de la présente loi ainsi que des fournisseurs de services de télécommunication.

2- La demande d'interconnexion ne peut être refusée si elle est raisonnable au regard des besoins du demandeur d'une part, et des capacités de l'opérateur à la satisfaire d'autre part. Le refus d'interconnexion est motivé.

3- Un décret pris en Conseil des Ministres détermine les conditions générales d'interconnexion, notamment celles liées aux exigences essentielles, et les principes de tarification auxquels les accords d'interconnexion doivent satisfaire.

4- Les exploitants de réseaux ouverts au public visés aux articles 10 et 11 ci-dessus sont tenus de publier, dans les conditions déterminées par leur cahier des charges, une offre technique et tarifaire d'interconnexion approuvée préalablement par l'Autorité de réglementation.

5- Les tarifs d'interconnexion rémunèrent l'usage effectif du réseau de transport et de desserte, et reflètent les coûts correspondants.

Following conditions specify contracts freely entered into by the parties unless there is a disagreement in which case regulator CRT arbitrates.

…

TITRE III: DES SITUATIONS ET PRATIQUES ANTICONCURRENTIELLES

Article 49:

Les actions et pratiques qui ont pour objet ou qui peuvent avoir pour effet d'empêcher, de restreindre ou de fausser la concurrence sur un marché sont prohibées, notamment lorsqu'elles tendent à:

a) limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises;

b) faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse;

c) limiter ou contrôler la production, les investissements ou le progrès technique;

d) répartir les marchés ou les ressources d'approvisionnement.

Article 50:

Une entreprise se trouve dans une position dominante sur le marché en ce qui concerne un genre spécifique d'articles ou de prestations lorsqu'elle contrôle au moins un tiers du marché. L'Autorité de réglementation publie annuellement la liste des entreprises qu'elle considère comme occupant une position dominante.

Est prohibée l'exploitation abusive par une entreprise ou un grouped'entreprises:

a) d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci;

b) de l'état de dépendance économique dans lequel se trouve, à son égard, une personne cliente ou fournisseur qui ne dispose pas de solution équivalente.

Ces abus qui sont appréciés par l'Autorité de réglementation, peuvent notamment consister en un refus injustifié ou discriminatoire d'accès aux réseaux de télécommunication ouverts au public ou de fourniture de services de télécommunication, ainsi que dans la rupture injustifiée ou discriminatoire de relations commerciales établies. Les contestations sont portées devant les juridictions compétentes.

Article 51:

Les opérateurs en position dominante sur le marché des télécommunications sont tenus d'individualiser sur le plan comptable la ou les activités autorisées. L'Autorité de réglementation prescrit la forme de cette (ou ces) comptabilité (s) interne(s).

2.3 Décret n° 2000-155/PRES/PM/MC portant concession à l'ONATEL des réseaux et services sous droits exclusifs de l'État.

Article 1.:

En application de l'article 6 de la loi n°051/98/AN du 4 décembre 1998 portant réforme du secteur des télécommunications, l'établissement des réseaux nationaux et internationaux non radioélectriques de télécommunication ouvert au public, la fourniture du service télégraphique, la mise en place et l'exploitation de toutes infrastructures internationales sur le territoire burkinabè aux fins d'acheminer les communications internationales au départ et à destination du Burkina Faso, sont exclusivement confiés à l'ONATEL. (Authors' underlining)

Article 2.:

L'exclusivité sur les réseaux et services visés à l'article 1 ci-dessus est accordée à l'ONATEL pour compter de la date de signature du présent décret et prenant fin le 31 décembre 2005.

2.4 Décret n° 2001-692/PRES promulguant la loi n°033-2001/AN du 04 décembre 2001 portant modification de la loi n° 15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso

ARTICLE 1: Est promulguée la loi n° 033-2001/AN du 04 décembre 2001 portant modification de la loi n° 15/94/ADP du 5 mai 1994 portant organisation de la concurrence au Burkina Faso.

ARTICLE 2: Le présent décret sera publié au Journal Officiel du Faso.

2.5 Loi n° 061-2008/AN portant réglementation générale des des réseaux et services de communications éléctroniques au Burkina Faso

CHAPITRE I: DEFINITIONS

Article 2:

Aux termes de la présente loi, on entend par:

Accès: la mise à la disposition d'une autre entreprise, dans des conditions bien définies et de manière exclusive ou non exclusive, de ressources et/ou de services en vue de la fourniture de services de communications électroniques ou de services informatiques ou de contenu radiodiffusé. Cela couvre notamment:

- l'accès à des éléments de réseaux et des ressources associées et éventuellement la connexion des équipements par des moyens fixes ou non (cela comprend notamment l'accès à la boucle locale ainsi qu'aux ressources et services nécessaires à la fourniture de services par la boucle locale);
- l'accès à l'infrastructure physique, y compris aux bâtiments, gaines et pylônes;
- l'accès aux systèmes logiciels pertinents, y compris aux systèmes d'assistance à l'exploitation;
- l'accès à la conversion du numéro d'appel ou à des systèmes offrant des fonctionnalités équivalentes;
- l'accès aux réseaux fixes et mobiles, notamment pour l'itinérance;
- l'accès aux systèmes d'accès conditionnel pour les services de télévision numérique;
- l'accès aux services de réseaux virtuels.

On interconnexion:

Article 64:

A ce titre, l'Autorité de régulation veille:

a) à une compatibilité des services et réseaux;
b) à la publication des catalogues d'interconnexion;
c) à l'existence de lignes directrices pour la négociation des contrats d'interconnexion;
d) à la transparence des contrats;
e) à l'absence de discrimination entre opérateurs dans l'accès aux services d'interconnexion;
f) au niveau, à la structure et à la base de calcul des coûts d'interconnexion;
g) à la qualité de l'interconnexion;
h) au dégroupage des éléments du réseau;
i) à l'existence de procédures rapides de règlement des différends;
j) à l'existence de moyens pour faire appliquer les règles;
k) à la consultation des acteurs du marché aux fins de statuer sur les problèmes particuliers de réglementation ou de régulation.

Article 65:

Outre les mesures qui peuvent être prises à l'égard d'entreprises disposant d'une puissance significative sur le marché, conformément à l'article 67, l'Autorité de régulation impose de façon objective, transparente, proportionnée et non discriminatoire:

a) des obligations aux entreprises qui contrôlent l'accès aux utilisateurs finals, y compris, dans les cas le justifiant, l'obligation d'assurer l'interconnexion de leurs réseaux là où elle n'est pas encore réalisée, dans la mesure de ce qui est nécessaire pour assurer la connectivité de bout en bout;

b) l'obligation de fournir l'accès à des ressources spécifiques, dans des conditions équitables, raisonnables et non discriminatoires, aux opérateurs, dans la mesure de ce qui est nécessaire pour assurer l'accès des utilisateurs finals à des services spécifiés par voie règlementaire.

Article 67:

L'Autorité de régulation, après avis de la Commission de l'UEMOA, précise en les motivant, les obligations des opérateurs ayant une puissance significative sur un marché du secteur des communications électroniques. Ces obligations qui sont visées dans le chapitre 3 du présent titre s'appliquent pendant une durée limitée fixée par l'Autorité de régulation, pour autant qu'une nouvelle analyse du marché concerné, effectuée en application du présent article ne les rende pas caduques.

Toute autre obligation autorisée par l'UEMOA ou par la CEDEAO peut être appliquée à un opérateur puissant, dans des circonstances exceptionnelles, après avis de la Commission nationale de la concurrence.

Section 2: Obligations de non-discrimination

Article 71:

En ce qui concerne l'interconnexion et/ou l'accès, l'Autorité de régulation peut, conformément aux dispositions de l'article 67, imposer des obligations de non-discrimination.

Section 4: Obligations relatives à l'accès à des ressources de réseau spécifiques et à leur utilisation

Article 74:

L'Autorité de régulation peut, conformément aux dispositions de l'article 67, imposer à des opérateurs l'obligation de satisfaire les demandes raisonnables d'accès à des éléments de réseau spécifiques et à des ressources associées et d'en autoriser l'utilisation, notamment lorsqu'elle considère qu'un refus d'octroi de l'accès ou des modalités et conditions déraisonnables ayant un effet similaire empêcheraient l'émergence d'un marché de détail concurrentiel durable ou risqueraient d'être préjudiciables à l'utilisateur final.

Les opérateurs peuvent notamment se voir imposer:

a) d'accorder à des tiers l'accès à des éléments et/ou ressources de réseau spécifiques, y compris l'accès dégroupé à la boucle locale;

b) de négocier de bonne foi avec les entreprises qui demandent un accès;

c) de ne pas retirer l'accès aux ressources lorsqu'il a déjà été accordé;

d) d'offrir des services particuliers en gros en vue de la revente à des tiers;

e) d'accorder un accès ouvert aux interfaces techniques, protocoles ou autres technologies clés qui revêtent une importance essentielle pour l'interopérabilité des services ou des services de réseaux virtuels;

f) de fournir une possibilité de co-localisation ou d'autres formes de partage des ressources, y compris le partage des gaines, des bâtiments ou entrées de bâtiment, des antennes ou pylônes, des trous de visite et boîtiers situés dans la rue;

g) de fournir les services spécifiques nécessaires pour garantir aux utilisateurs l'interopérabilité des services de bout en bout, notamment en ce qui concerne les ressources destinées aux services de réseaux intelligents ou permettant l'itinérance sur les réseaux mobiles;

h) de fournir l'accès à des systèmes d'assistance opérationnelle ou à des systèmes logiciels similaires nécessaires pour garantir l'existence d'une concurrence loyale dans la fourniture des services;

i) d'interconnecter des réseaux ou des ressources de réseau;

j) de donner accès à des services associés comme ceux relatifs à l'identité, l'emplacement et l'occupation.

Article 75:

Lorsqu'elle examine s'il y a lieu d'imposer les obligations visées à l'article 74 et en particulier lorsqu'elle évalue si ces obligations seraient proportionnées aux objectifs énoncés à l'article 5 de la présente loi, l'Autorité de régulation prend notamment en considération les éléments suivants:

a) la viabilité technique et économique de l'utilisation ou de la mise en place de ressources concurrentes, compte tenu du rythme auquel le marché évolue et de la nature et du type d'interconnexion et d'accès concerné;

b) le degré de faisabilité de la fourniture d'accès proposée, compte tenu de la capacité disponible;

c) l'investissement initial réalisé par le propriétaire des ressources, sans négliger les risques inhérents à l'investissement;

d) la nécessité de préserver la concurrence à long terme;

e) le cas échéant, les éventuels droits de propriété intellectuelle;

f) la fourniture de services panafricains. (Authors' emphasis)

Section 6: Séparation fonctionnelle

Article 81:

L'Autorité de régulation peut, conformément aux dispositions de l'article 67, imposer à une entreprise verticalement intégrée l'obligation de confier ses activités de fourniture en gros de produits d'accès à une entité économique fonctionnellement indépendante. Cette entité économique fournit des produits et services d'accès à toutes les entreprises, y compris aux autres entités économiques au sein de la société mère, aux mêmes échéances et conditions, y compris en termes de tarif et de niveaux de service et à l'aide des mêmes systèmes et procédés.

CHAPITRE III: CO-LOCALISATION ET PARTAGE DE RESSOURCES

Article 144:

Lorsqu'une entreprise fournissant des réseaux de communications électroniques a le droit, en vertu de la présente loi, de mettre en place des ressources sur, au-dessus ou au-dessous de propriétés publiques ou privées, ou peut profiter d'une procédure d'expropriation ou d'utilisation d'un bien foncier, l'Autorité de régulation impose le partage de ces ressources ou de ce bien foncier, y compris des entrées de bâtiment, des pylônes, antennes, gaines, trous de visite et boîtiers situés dans la rue.

Article 145:

L'Autorité de régulation impose aux détenteurs des droits visés à l'article 144 ci-dessus, le partage de ressources ou de biens fonciers y compris la co-localisation physique ou de prendre des mesures visant à faciliter la coordination de travaux publics pour protéger l'environnement, la santé ou la sécurité publique ou atteindre des objectifs d'urbanisme ou d'aménagement du territoire uniquement après une période de consultation publique appropriée au cours de laquelle toutes les parties intéressées ont la possibilité de donner leur avis. Ces modalités de partage ou de coordination peuvent comprendre des règles de répartition des coûts du partage de la ressource ou du bien foncier.

3. Cape Verde

3.1 Decreto-Legislativo n°. 7/2005 de 24 de Novembro

Artigo 24.

Accesso à condutas

4. Para efeitos do n.° 1, a concessionaria debe disponibilizar uma oferta de acesso às condutas, postes, outras instalacoes e locais, da qual devem constar as condicoes de acesso e utilizacao, nos termos a definir pela ARN.

4. Cote d'Ivoire

4.1 Loi n°95-526 du 7 juillet 1995 portant Code des Télécommunications

Article premier:- Définitions

Aux fins de la présente loi, on entent par:

16) Câble sous-marin: Tout support physique de signaux de Télécommunications qui utilise le milieu marin comme voie d'acheminement.

Il est dit international lorsqu'il relie deux ou plusieurs états;

PRINCIPES GENERAUX

ART.4.:-Le gouvernement veille à ce que:

- Soient assurées de façon indépendante d'une part, les fonctions de réglementation et de suivi des activités relevant du secteur des Télécommunications, d'autre part, les fonctions d'exploitations de réseau ou de fourniture de services de Télécommunications
- La fourniture des services qui ne sont pas confiés exclusivement à une entreprise de Télécommunications s'effectue dans les conditions d'une concurrence loyale:
- Soit respecté, par toutes les entreprises de Télécommunications, le principe d'égalité de traitement des usages, quelque soit le contenu du message transmis;
- L'accès au réseau public soit assuré dans des conditions objectives transparentes et non discriminatoires.

It defines the concession for the monopoly for Cote d'Ivoire Telecom. It also provides articles covering interconnection.

ART.49.: -Les détériorations des câbles sous-marins commises dans les eaux territoriales ou sur le plateau continental contigu au territoire de la Cote d'Ivoire par un membre de l'équipage d'un navire ivoirien ou étranger, seront jugées par le tribunal d'Abidjan ou: du port d'attache du navire sure lequel est embarqué l'auteur;

- Du premier port ivoirien ou ce navire abordera;
- Le tribunal dont la compétence territoriale s'étend sur le prolongement maritime du lieu de l'infraction.

The 1997 Act which follows defines the setting up of the Regulator.

4.2 Décret n° 97-391 du 9 juillet 1997 définissant les catégories et les modalités d'octroi des autorisations d'établissement et d'exploitation des réseaux radioélectriques

V- Obligations permettant le contrôle du cahier des charges

- L'ensemble des conventions d'interconnexion, lorsque l'opérateur fait appel contractuellement à des sociétés de commercialisations de service, et doit veiller, dans ses relations contractuelles avec ses sociétés au respect de ses engagements au regard des informations à transmettre au ministre chargé des Télécommunication et à l'Agence des Télécommunications. A la demande motivée du ministre des Télécommunications ou de l'Agence des Télécommunications, l'opérateur fournit d'autres informations nécessaires qui sont traitées dans le respect des affaires et notamment:

… – Les Conventions de partage des infrastructures;

SECTION III

CONNEXION AVEC D'AUTRES RESEAUX

ART.26: Les réseaux radioélectriques indépendants à usage partagé peuvent être connectés à réseau ouvert au public dans les cas suivants:

- l'interconnexion est destinée à relier entre eux les membres d'un groupe fermé d'utilisateurs,
- l'interconnexion est destinée à permettre l'accès à des tiers au groupe fermé d'utilisateurs

ART.27: Les conditions techniques et financières de connexion du réseau de l'exploitant au réseau public de télécommunications, sont fixées par convention entre l'exploitant et l'opérateur convention, approuvée par l'Agence des Télécommunications de Cote d'Ivoire (ATCI). Toute interconnexion avec d'autres réseaux indépendants est soumise à l'accord préalable de l'Agence des Télécommunications de Cote d' Ivoire.

4.3 Décret n°97-392 du 9 juillet 1997 définissant les modalités d'octroi des Autorisations de fournitures de services de Télécommunications

ART.18: Interconnexion entre des services

18.1: Le fournisseur informe ses utilisateurs des autres services auxquels son service est interconnecté:

Tout utilisateur peut demander au fournisseur de services d'interconnecter son service avec d'autres services. Le fournisseur de services doit faire ses meilleures offres pour satisfaire cette demande. En cas de refus, il doit en donner les motifs. Il ne peut se fonder sur l'incompatibilité technique des systèmes utilisés existe une norme internationale d'interconnexion appropriée aux services destinés à s'interconnecter. Les motifs de refus peuvent être fondés notamment sur:

- L'hétérogénéité des conditions d'offre des autres fournisseurs remettant gravement en cause le niveau de permanence, de disponibilité et de qualité de son propre service
- la situation résultant de l'interconnexion ayant pour effet de porter atteinte aux conditions d'une concurrence loyale.

L'Agence des Télécommunications peut être saisie en cas de désaccord sur le principe ou les conditions de l'interconnexion.

18.2 en outre, dans le cas d'interconnexion avec un service de l'opération des services concédés,les conditions techniques et financières de cette interconnexion sont fixées dans le cadre d'une convention conclue entre le fournisseur et l'opérateur de services concédés, soumise à l'approbation de l'Agence des Télécommunications

4.4 Décret n° 98-625 du 11 novembre 1998 portant création du fonds national des Télécommunications et fixant les modalités de fonctionnement

4.5 Décret n° 2004-91 du 22 janvier 2004 portant définition d'une période transitoire avant l'ouverture à la Concurrence du secteur des Télécommunications

Cette période transitoire qui marque la fin du monopole de Côte d'Ivoire Télécom sur les services exclusifs, court pour compter du 03 février 2004 et ne peut aller au-delà de la date du 20 décembre de la même année.

4.6 Décret n° 2005-17 du 06 janvier 2005 portant autorisation pour l'exploitation des services exclusifs par la société Arobase Telecom S.A.

Article 3: Les avenants à la Convention de Concession et au cahier des Charges de la Société AROBASE TELECOM S.A. sont annexés au présent décret.

LOI N° 2001-339 du 14 juin 2001 makes various changes to create licences and their accompanying Cahier de Charges.

4.7 Cahiers de Charges Operateur Mobile

Specifies international gateway licences from 2004

Interconnection agreements entered into freely by operators

5. Gambia

5.1 Information and Communications Act 2009

4. Principles, item 2

- prevention of any distortion and restriction of competition in the telecommunication sector, with due allowance for ongoing transitional regimes;

Part 3, item 2. Exclusivity

Except where a licence had been issued and exclusivity rights vested in a licensee prior to the enactment of this Act, the Department of State shall not include in a licence or the terms of a licence an exclusivity period or monopoly to the licence

Part 4, item 33, (2)

Notwithstanding the provisions of this Act, conditions which may be applied to operators with significant market power as defined in Section xxx and determined by the Authority following the procedures determined in this Act, include the obligation to:

e. publish delivery terms and tariff information;

h. use cost-oriented pricing based on cost calculations;

k. keep separate accounts on its activities;

l. interconnect an Information and Communications network to another Information and Communications network

m. provide universal service

Part 5, Item 38

38. Sharing of Property and Facilities

(1) Licencees shall promote among themselves the conclusion of agreements aimed at sharing property or facilities, either installed or to be installed, which agreements shall be notified to the Authority.

(2) Where there are no viable alternatives to the installation of new infrastructure due to environmental protection, public health, public security, cultural heritage, country planning and town and country landscapes preservation, without prejudice to the powers of local authorities, the Authority may, following a consultation period of interested parties, determine the sharing of facilities, including ducts, masts and other installations in the property, whether or not the owners thereof are undertakings providing Information and Communications networks and services.

(3) Determinations issued pursuant to the preceding Subsection may include rules for apportioning costs.

(4) In the event of sharing, the Authority may define measures that place restrictions on the operation of the facilities to be installed, namely a limit on the maximum levels of transmission power.

Part 6, item 46

This Part is entitled Ensuring Competition and Item 46 covers Fair Competition.

Part 6, item 48, item 3

3) When conducting a market analysis, deciding whether an undertaking has significant market power and imposing obligations on undertakings with significant market power, the Authority shall take account of the relevant provisions of international treaties and/or agreements and shall ensure, within the scope of its competence, compliance with and implementation of such treaties and/or agreements in The Gambia.

(4) Where the Authority determines that a relevant market is not effectively competitive, it shall identify undertakings with significant market power in that market and impose appropriate and specific regulatory obligations, or maintain or amend such obligations where they already exist.

Item 49 covers The Determination of Significant Market Power

Item 50 covers the Imposition of Obligations on undertakings having significant market power

Item 51 covers Cost Accounting Obligation

(4) Pending the implementation of cost accounting by 2009, the interconnection rates must be calculated on the basis of the following recommendations:

(a) using a regional benchmark;

(b) using an existing cost calculation tool;

(c) a top-down model based on forward-looking historical costs maybe used initially (e.g. for three years) before moving to a model based on long-run incremental costs (LRIC), thereby giving the dominant operator an incentive for greater efficiency;

(d) for setting the appropriate rate of return based on the cost of capital, it is recommended that market data be used;

(e) for calculating the cost of equity, use of the hybrid capital asset pricing model (CAPM) is recommended, incorporating the country risk and correction coefficient R.

Item 54 covers Infrastructure Sharing:

4) The Authority shall encourage access to alternative infrastructure on the basis of commercial negotiations, in order to foster and entrench competition as rapidly as possible and shall ensure that such access is provided under conditions of fairness, non-discrimination and equality of access.

PART VII – ACCESS AND INTERCONNECTION

1. Right to Interconnection

(1) A licensee has the right and, when requested by another licensee, the obligation, to negotiate the interconnection of its Information and Communications system or service, with the information and communications system or services of another licensee, in objective, transparent and non-discriminatory conditions, in order to provide end-to-end connectivity and inter-operationability of services for all customers at fair and reasonable prices.

(2) The request for interconnection shall not be refused if it is reasonable in terms of the requesting party's requirements on one hand and the operator's capacity to meet it on the other. Any refusal to interconnect shall be substantiated and notified to the requesting party and to the Authority

(3) Except where prohibited by the Interconnecting operator’s licence or by this Act, a network controller shall allow an interconnecting operator to route calls within The Gambia or to international destinations

2. Principles

An interconnection agreement shall not, directly or indirectly-

(a) preclude or frustrate the exercise by any person of the rights or privileges afforded under a licence, this Act and the regulations made under this Act;

(b) impose any penalty, obligation or dis-advantage on any person for exercising a right under a licence, this Act and the regulations made under this Act;

(c) prohibit a person from providing an interconnected service which that person is able lawfully to provide; or

(d) frustrate the provision by a person of a Information and Communications system or service that the person is able to provide lawfully.

Section 62. Non-Discrimination

(1) Interconnection shall be provided on a non-discriminatory basis in similar conditions and for similar circumstances.

(2) A network controller shall ensure that-

(a) the rates charged do not vary on the basis of the class of customers to be served;

(b) it provides interconnecting operator with interconnection facilities and information under the same conditions and in the same quality that it affords to its own subsidiaries, affiliates, or other similarly situated tele-communications service providers;

(c) it avails to an interconnecting operator all necessary information and specifications related to interconnection; and

(d) customers of an interconnecting operator receive treatment that is no less favorable than the treatment which it affords to its own customers or the customers of its subsi-diaries, affiliates, or other similarly situated Information and Communications service providers.

Section 65: Content of Interconnection Agreements

(1) Notwithstanding the provisions of section xxx above, interconnection agreements shall be in writing and contain the following minimal elements:

(a) the date of entry into force, duration and arrangements for the modification, termination and renewal of the agreement;

(b) notification procedures and the contact details of the authorized representatives of each party for each field of competence

(c) the scope and specification of inter-connection;

(d) a description of the services provided by each party as well as of access to all ancillary or supplementary services or access to and use of premises or land necessary to support inter-connection;

(e) maintenance of end-to-end quality of service and other service levels;

(d) charges for interconnection on an incremental cost basis;

(e) billing and settlement procedures;

(f) ordering, forecasting, provisioning and testing procedures;

(g) points of interconnection or co-location;

(h) the amount of, or the forecast procedures to be used to determine, interconnection capacity to be provided;

(i) transmission of call line identity;

(j) provisions for network information on an open network architecture basis;

(k) provisions for information regarding system modernization or rationalization;

(l) technical specifications and standards;

(m) inter-operability testing, traffic management and measurement, and system maintenance;

(n) information handling and confidentiality provisions;

(o) duration for and renegotiation of the agreement;

(p) formation of appropriate working groups to discuss matters relating to interconnection and to resolve any disputes

(q) rules for compensation in the case of failure by one of the parties;

(r) dispute settlement procedures with mention, in the case of failure of negotiations between the parties, of mandatory recourse to the Authority

(2) In the absence of a RIO or for services not appearing in the RIO, theapplicable tariffs shall appear in annex to the agreement

Section 66: 66. Interconnection Charges

(1) Interconnection rates shall be-

(a) charged for each type of Information and Communications service and system for which interconnection is provided; and

(b) computed, taking into account only those costs directly related to interconnection plus a reasonable profit margin.

(2) Interconnection charges shall be structured to match the pattern of underlying costs incurred, and to distinguish and separately price-

(a) fixed charges for the establishment and im-plementation of physical interconnection;

(b) periodic rental charges for use of facilities, equipment and resources including inter- connect and switching capacity; and

(c) variable charges for Information and Communications services and supplementary services.

(3) Interconnection charges shall-

(a) be objective and sufficiently unbundled so that the interconnecting operator does not pay charges that are not directly related to incremental costs of the network controller in providing the interconnection;

(b) be independently verifiable, fair and properly derived from underlying costs, built up from the cost of separately identifiable network elements; and

(c) not be designed to facilitate cross-subsides by a network controller of its network or other services.

(4) Interconnection charges shall not exceed the retail charges for the provision of the equivalent services or facilities to be provided by the interconnection.

(5) An interconnecting operator may acquire ser-vices from a network controller at any retail price offered by the network controller, without prejudice to any right to acquire those same or similar ser-vices under an interconnection agreement.

Section 69: Points of Interconnection

(1) A point of interconnection shall be established and maintained at any technically feasible point as agreed by the parties and the quality of apparatus and facilities shall not prejudice the interconnecting operator.

(2) An interconnecting operator shall provide sufficient details to the network controller relating to point of interconnection to-

(a) enable the network controller to assess the system conditioning that may be required; and

(b) estimate the costs of establishing the points of interconnection.

(3) A point of interconnection shall be established as soon as practicable following a request, but in any case not later than the period specified in the agreement from the date of the request.

(4) A network controller is responsible for the cost of –

(a) building and maintaining its ports, datafill and switching capacity to support the inter-connection; and

(b) transport of all material from its origination to points of interconnection.

(5) Where parties providing interconnect services to each other are Information and Communications system pro-viders, they may mutually agree on the point of interconnection and share the costs of establishing the point of interconnection.

PART VII – ACCESS AND INTERCONNECTION

1. Right to Interconnection

(1) A licensee has the right and, when requested by another licensee, the obligation, to negotiate the interconnection of its Information and Communications system or service, with the information and communications system or services of another licensee, in objective, transparent and non-discriminatory conditions, in order to provide end-to-end connectivity and inter-operationability of services for all customers at fair and reasonable prices.

(2) The request for interconnection shall not be refused if it is reasonable in terms of the requesting party's requirements on one hand and the operator's capacity to meet it on the other. Any refusal to interconnect shall be substantiated and notified to the requesting party and to the Authority

(3) Except where prohibited by the Interconnecting operator's licence or by this Act, a network controller shall allow an interconnecting operator to route calls within The Gambia or to international destinations

2. Principles

An interconnection agreement shall not, directly or indirectly-

(a) preclude or frustrate the exercise by any person of the rights or privileges afforded under a licence, this Act and the regulations made under this Act;

(b) impose any penalty, obligation or dis-advantage on any person for exercising a right under a licence, this Act and the regulations made under this Act;

(c) prohibit a person from providing an interconnected service which that person is able lawfully to provide; or

(d) frustrate the provision by a person of a Information and Communications system or service that the person is able to provide lawfully.

3. Terms and Conditions of Interconnection Agreements

(1) The terms and conditions of an interconnection agreement shall promote increased public and efficient use of information and communications systems and services and facilities.

(2) An Interconnection agreement shall facilitate end-to-end connectivity by ensuring that a call originated on the Information and Communications system of an interconnecting operator can be terminated at any point on the telecommunication system of the network controller on non-discriminatory basis.

(3) The transmission of calls across and within Information and Communications systems shall be seamless to both the calling and called parties.

(4) The procedure for forecasting, ordering and provisioning interconnection shall be efficient and occur within a reasonable time frame.

(5) The facilities or systems used for inter-connection shall be provided in sufficient capacity to enable the efficient transfer of signals between interconnected telecommunication systems.

(6) A service acquired as part of an interconnection facility may be used for any lawful purpose.

4. Non-Discrimination

(1) Interconnection shall be provided on a non-discriminatory basis in similar conditions and for similar circumstances.

(2) A network controller shall ensure that-

(a) the rates charged do not vary on the basis of the class of customers to be served;

(b) it provides interconnecting operator with interconnection facilities and information under the same conditions and in the same quality that it affords to its own subsidiaries, affiliates, or other similarly situated tele-communications service providers;

(c) it avails to an interconnecting operator all necessary information and specifications related to interconnection; and

(d) customers of an interconnecting operator receive treatment that is no less favorable than the treatment which it affords to its own customers or the customers of its subsi-diaries, affiliates, or other similarly situated Information and Communications service providers.

5. Legal regime of interconnection agreement

(1) Ìnterconnection shall be the subject of a private law agreement, commonly called the interconnection contract, between the two parties in question. The agreement shall specify, subject to the applicable legislation and regulations, the technical and financial conditions pertaining to the interconnection.

(2) Upon signature, it shall be communicated to the Authority.

(3) Companies obtaining information from other companies prior to, during or following the access or interconnection agreement negotiation process shall use that information solely for the purposes foreseen when it was communicated and shall always respect the confidentiality of information transmitted or retained. Any information received shall not be communicated to other parties, in particular other services, subsidiaries or partners for which they could constitute a competitive advantage.

6. Good Faith negotiations

(1) The parties to an interconnection agreement shall negotiate in good faith and use their reasonable endeavors to resolve disputes as to the form and subject of an interconnection agreement.

(2) A network controller shall-

(a) provide network information to an inter-connecting operator on receipt of a written request; and

(b) give an interconnecting operator's request for interconnection reasonable priority in his or her dealing with customer orders.

7. Content of Interconnection Agreements

(1) Notwithstanding the provisions of section xxx above, interconnection agreements shall be in writing and contain the following minimal elements:

(a) the date of entry into force, duration and arrangements for the modification, termination and renewal of the agreement;

(b) notification procedures and the contact details of the authorized representatives of each party for each field of competence

(c) the scope and specification of inter-connection;

(d) a description of the services provided by each party as well as of access to all ancillary or supplementary services or access to and use of premises or land necessary to support inter-connection;

(e) maintenance of end-to-end quality of service and other service levels;

(d) charges for interconnection on an incremental cost basis;

(e) billing and settlement procedures;

(f) ordering, forecasting, provisioning and testing procedures;

(g) points of interconnection or co-location;

(h) the amount of, or the forecast procedures to be used to determine, interconnection capacity to be provided;

(i) transmission of call line identity;

(j) provisions for network information on an open network architecture basis;

(k) provisions for information regarding system modernization or rationalization;

(l) technical specifications and standards;

(m) inter-operability testing, traffic management and measurement, and system maintenance;

(n) information handling and confidentiality provisions;

(o) duration for and renegotiation of the agreement;

(p) formation of appropriate working groups to discuss matters relating to interconnection and to resolve any disputes

(q) rules for compensation in the case of failure by one of the parties;

(r) dispute settlement procedures with mention, in the case of failure of negotiations between the parties, of mandatory recourse to the Authority

(2) In the absence of a RIO or for services not appearing in the RIO, theapplicable tariffs shall appear in annex to the agreement

8. Interconnection Charges

(1) Interconnection rates shall be-

(a) charged for each type of Information and Communications service and system for which interconnection is provided; and

(b) computed, taking into account only those costs directly related to interconnection plus a reasonable profit margin.

(2) Interconnection charges shall be structured to match the pattern of underlying costs incurred, and to distinguish and separately price-

(a) fixed charges for the establishment and im-plementation of physical interconnection;

(b) periodic rental charges for use of facilities, equipment and resources including inter- connect and switching capacity; and

(c) variable charges for Information and Communications services and supplementary services.

(3) Interconnection charges shall-

(a) be objective and sufficiently unbundled so that the interconnecting operator does not pay charges that are not directly related to incremental costs of the network controller in providing the interconnection;

(b) be independently verifiable, fair and properly derived from underlying costs, built up from the cost of separately identifiable network elements; and

(c) not be designed to facilitate cross-subsides by a network controller of its network or other services.

(4) Interconnection charges shall not exceed the retail charges for the provision of the equivalent services or facilities to be provided by the interconnection.

(5) An interconnecting operator may acquire ser-vices from a network controller at any retail price offered by the network controller, without prejudice to any right to acquire those same or similar ser-vices under an interconnection agreement.

9. Technical Standards

(1) An interconnecting agreement shall provide for adequate capacity and service levels and reasonable remedies for any failure to meet those capacity and service levels.

(2) The parties to an Interconnection agreement shall comply with all the relevant standards of the Union and such other technical standards as the Authority may, from time to time, impose.

10. Calling Line Identity

(1) A calling line identity and all the necessary signaling data shall be passed between interconnecting parties in accordance with standards issued by the Authority.

(2) A dispute in connection with the collection and delivery of calling line identity shall be submitted to the Authority for determination.

11. Points of Interconnection

(1) A point of interconnection shall be established and maintained at any technically feasible point as agreed by the parties and the quality of apparatus and facilities shall not prejudice the interconnecting operator.

(2) An interconnecting operator shall provide sufficient details to the network controller relating to point of interconnection to-

(a) enable the network controller to assess the system conditioning that may be required; and

(b) estimate the costs of establishing the points of interconnection.

(3) A point of interconnection shall be established as soon as practicable following a request, but in any case not later than the period specified in the agreement from the date of the request.

(4) A network controller is responsible for the cost of -

(a) building and maintaining its ports, datafill and switching capacity to support the inter-connection; and

(b) transport of all material from its origination to points of interconnection.

(5) Where parties providing interconnect services to each other are Information and Communications system pro-viders, they may mutually agree on the point of interconnection and share the costs of establishing the point of interconnection.

12. Requests for new forms of interconnection

(1) A request by an interconnecting operator for a new form of interconnection shall be in writing and provide the network controller with information about the form of interconnection, the approximate date the interconnection is required and an estimate of the capacity required.

(2) The interconnecting operator shall forward a copy of the request for interconnection to the Authority.

(3) The network controller shall, within fifteen days of receipt of the request for interconnection, inform the interconnecting operator in writing-

(a) of its ability to supply the form of inter-connection requested and its schedule of supply; and

(b) whether it is able to do so within the time frame requested by the interconnection operator.

(4) If a dispute in negotiations arises, either network controller or the interconnection operator may re-quest the Authority's assistance in resolving the dispute through mediation.

(5) The Authority shall resolve disputes brought to it within one hundred and twenty days of its receipt of the referral or of receipt of information requested from the parties following the referral.

(6) The network controller shall, where it has informed the interconnecting operator that it is able to provide interconnection, ensure that the system conditioning and provisioning procedures required to provide the interconnection are undertaken within forty-five days from the date of notification.

(7) A network controller shall provide ninety days written notice to an interconnecting operator of any planned changes to its Information and Communications system that may have material impact on the inter-connecting operator.

13. Confidentiality of Information

(1) A party who receives information in relation to interconnection from another party that is designated by the party as confidential shall keep the information confidential and may disclose it only to-

(a) employees, agents or advisers who need to have that information for the purpose of the provision of or advising on interconnection;

(b) persons to whom the disclosure is authorized by that other party, where the disclosure is authorized or required by law; and

(c) the Authority.

(2) A confidential information related to-

(a) interconnection of a party received by another party; or

(b) business information generated by the tele-communications system of a party as a result of interconnection,

shall be used solely for the purpose of providing interconnection, and shall not be disclosed to any person involved in the development or provision of retail services of the other party or its subsidiaries or affiliates.

(3) The confidentiality provision of an interconnection agreement shall not prevent or frustrate the public disclosure by the Authority of a provision of the agreement in the public interest.

14. Review of Interconnection Agreements

(1) The Authority may review all interconnection agreements entered into or proposed to be entered into between authorised providers.

(2) The Authority may require information from either the interconnecting operator or from the network controller, or from both of them

(3) The Authority shall, in reviewing interconnection agreements, ensure that:

(a) the agreement complies with the applicable regulatory and legal texts, in particular those provisions relating to interconnection and the terms of reference of operators;

(b) the provisions of the agreement contain no discriminatory measures liable to advantage or disadvantage one of the parties vis-à-vis other operators or service providers.

(4) Notwithstanding the provisions of subsection 2, the Authority shall in particular take into account-

(a) the need to ensure satisfactory end-to-end telecommunication services for users;

(b) the objective of stimulating a competitive market;

(c) the need to promote co-operation with counterparts in other countries;

(d) the principles of non-discrimination, including equal access and proportionality;

(e) the need to maintain and develop universal access;

(f) the need to ensure fair and incremental cost oriented access charges; and

the dominance of the operator requesting interconnection from whom interconnect-ion is requested

15. Modification of Interconnection Agreements

(1) When indispensable in order to guarantee fair competition, non-discrimination between operators and the interoperability of networks and services, the Authority may request the parties to modify the interconnection agreement.

(2) In case of a request for modification, the Authority shall send the parties concerned its requests for modification, duly substantiated. The parties concerned shall have a period of one (1) month, as from the date of the request for modification, to amend the interconnection agreement.

(3) The Authority may, either automatically or at the request of one of the parties, set a deadline for signature of the agreement, after which they must intervene to bring the negotiations to a conclusion so that negotiations do not become a barrier to the entry of new operators.

(4) Operators which so request must be allowed to consult, in the offices of the Authority, in the manner that the latter shall decide and respecting normal business confidentiality, the interconnection contracts concluded by operators.

(5) Where the Authority considers it urgent to take action to safeguard competition and protect users' interests, it may request that interconnection between the two networks be provided immediately, pending conclusion of the agreement.

(6) Where the Authority has not formulated a request for modification within three (3) months as from receipt of the interconnection agreement, requests formodification shall cover only those amendments aimed at guaranteeing that each party receive no worse treatment in terms of non-discrimination as compared to those offered in more recent agreements signed by the other party

16. Reference interconnect offer

1 The Authority shall publish a clear and transparent procedure governing approval of the reference interconnect offer (RIO) of operators possessing significant market power.

2 The Authority shall be entitled to request the operator with significant market power to add or modify the services set out in their offers, when such additions or modifications are justified for compliance with the principles of non-discrimination and cost-orientation of interconnection.

3 The offers must be as detailed as possible in order to facilitate and smooth interconnection contract negotiations.

4 The operator with significant market power is required to publish annually an RIO, reflecting its price list and the technical services offered. The offer must contain at least the following services:

a) services for the routing of switched traffic (call termination and origination);

b) leased lines;

c) interconnection links;

d) supplementary services and implementation arrangements therefore;

e) description of all points of interconnection and conditions of access thereto, for the purposes of physical co-location;

f) comprehensive description of proposed interconnection interfaces, including the signaling protocol and possibly the encryption methods used for the interfaces;

g) technical and tariff conditions governing the selection of carrier and portability.

5 Transparency obligations in line with international best practices, may be imposed by the Authority.

6 The Authority shall also ensure that any reference interconnect offer on the part of operators includes a list of the subscriber-serving exchanges that have are not available for interconnection for valid technical or security reasons, along with the provisional timing to open such subscriber exchanges to interconnection.

7 However, where the forwarding of expected operator traffic to or from subscribers connected to exchanges on the list mentioned in point 1 above is justified, the Authority shall ensure that the operator is required, at the request of the Authority, to establish a transitional offer for that exchange.

8. Such a transitional offer shall allow the requesting operator to define a fee schedule that reflects the costs which, in the absence of technical access restrictions, would have been incurred for switching communications to or from, first, the subscribers connected to that exchange, and second, the subscribers who would have been accessible without the need for routing through a higher-echelon exchange.

17. Publication of a reference interconnect offer

The reference interconnect offers approved by the Authority shall be made available on the dominant operators' websites and shall be accessible by a web link available on the Authority's website

18. Relevant cost orientation

1 Dominant operators shall respect the principle of relevant cost orientation, i.e. the costs of network components or the management structures of the operator effectively involved in the provision of interconnection.

2 The relevant costs shall include:

a) general network costs, i.e. costs relating to network components used by the operator both for services for its own customers and for interconnection services;

b) costs specific to interconnection services, i.e. costs directly incurred solely by those services.

3 Non-relevant costs shall include costs specific to services other than interconnection.

4 Relevant costs must take account of long-term economic efficiency, in particular the investments required for network renewal and expansion with a view to sustained quality of service. These costs shall incorporate the cost of return on capital invested.

19. Monitoring of interconnection tariffs

1 Dominant operators shall attach to the draft reference interconnect offer submitted to the Authority a detailed presentation justifying the main tariffs proposed. Once the harmonized method for calculating interconnection costs has been adopted, operators shall use it in order to provide the requested justification.

2 The Authority shall ensure that the methods and data used are valid. As required, it shall request the operator to adjust its calculations to rectify errors identified.

3 Should an operator fail to provide the justifications required, the Authority may in the operator's stead evaluate the costs based on the information available to it.

4 The Authority shall ensure that tariff setting for access and interconnection in so far as the dominant operators are concerned is cost-oriented and, as appropriate, that the fees payable by consumers are not dissuasive

20. Communication of information to the Authority

1 Dominant operators are required to communicate to the Authority, at least once a year, the basic information required for checking the calculation of interconnection costs. The Authority shall prepare and communicate to operators a detailed list of that information. It shall update the list regularly, taking account inter alia of steps taken to harmonize the calculation methods.

2 Dominant operators are required to allow the duly authorized staff or agents of the Authority to have access to their installations and information system in order to check the validity of the information received.

3 The Authority is bound to respect the confidentiality of non-public information to which it has access within the framework of auditing the interconnection costs. prices in order to eliminate any anticompetitive practices by the dominant operators.

21. Co-location

1 The Authority shall ensure that there is an obligation for dominant operators to provide co-location and that a co-location offer, presenting no barrier to the entry of competitors, is included in the reference interconnect offer for network interconnection and in the unbundling offer for unbundling.

2 The Authority shall ensure that:

a) where physical co-location is impossible for some valid reason such as lack of space, an alternative co-location offer must be made by the dominant operators;

b) the the Authority shall have a map of self-contained routing switches that are open to interconnection and are available for competitors' co-location: to this end, a working group composed of the Authority, the incumbent operator and alternative operators shall, in a fully transparent fashion, examine the problems of co-location and propose different solutions in order to solve problems that might arise. The industry could be involved in the work of this group so as to bring its technical expertise to bear.

3 The Authority shall work in advance on problems relating to access to premises, uninterrupted power, cooling and patch cables.

4 The Authority shall prevent the creation of any entry barriers inherent to co-location and provide solutions to conflicts relating to it as rapidly as possible..

5 The Authority shall establish a decision on the minimal set of conditions that must be fulfilled in any co-location offer, following consultation with the operators of public telecommunication networks. These conditions may lead to the specification, in every co-location offer, of the following:

a) information on co-location sites;

b) precise location of the operator's sites suitable for co-location;

c) publication or notification of an updated list of sites;

d) indications as to the availability of alternative solutions in the event that physical space for co-location is not available;

e) information on what types of co-location are available, and on the availability of electric systems and cooling equipment on the sites, as well as the rules governing sublease of the co-location premises;

f) indications on the time required to conduct feasibility studies for any co-location request;

g) information on equipment characteristics and any restrictions on equipment that can be accepted for co-location;

h) measures that operators offering co-location must take to ensure the security of their premises and to identify and resolve problems;

i) conditions under which competing operator personnel may enter the premises;

j) conditions under which competing operators and the regulator may inspect a site where physical co-location is impossible, or a site where co-location has been refused on the grounds of lack of capacity.

22. Interconnection Disputes

(1) Disputes relating to refusal to interconnect, interconnection agreements and conditions of access are brought before the Authority.

(2) The dispute shall be submitted in the form of a petition to the Authority from the petitioner requesting the Authority to resolve the dispute.

(3) The petition shall contain-

(a) a detailed statement of the matters and facts at issue;

(b) a statement of attempts made to resolve the dispute;

(c) a copy of the interconnection agreement, if any; and

(d) any other information as the petitioner deems relevant or the Authority may require.

(4) The party against whom the petition is filed shall be given the opportunity to respond to the petition.

(5) The Authority shall in considering a petition take such steps as are necessary to enable it to decide the dispute, and may establish, by way of written notice to the parties, all dates and deadlines not established.

(6) The Authority shall ensure that the committee responsible for taking decisions is impartial, and comprises people recognized for their competence and appointed intuitu personae.

(7) The Authority shall decide on a petition under this section within sixty days of its submission. That period may nevertheless be extended to four months when additional investigations and expert opinions are required. The decision shall be substantiated, and shall specify the equitable conditions, both technical and financial, under which the interconnection is to be effected. Matters remaining in dispute shall be brought before the competent jurisdictions.

(8) In the case of serious and blatant breach of the rules governing the information and communication sector, the Authority may, after inviting the parties to submit their remarks, order appropriate provisional measures to be taken to ensure the continued functioning of networks and services.

6. Ghana

6.1 National Communications Regulations, 2003 – Arrangement of regulations

General Principles

1b) non-discrimination

1c) fair competition

Non-discrimination in provision of service

3. (1) Every operator of public communications service shall having regard to the service authorized by its licence, offer and provide uniform, non-preferential service on a first-com, first-served basis to all persons within its geographical market area who request the service and who meet any predetermined conditions approved by the Authority for the provision of the service.

(2) It is not a violation of the principle of non-discrimination for an operator in deciding whether to provide the service to a person

(a) to consider the ability of a prospective customer to pay for the service;

(b) to make other reasonable classifications of customers such as business and residential customers and to provide the service on the basis of the classification, except that any classification applied by an operator shall

(i) be approved by the Authority; and

(ii) be such that the service provided to persons within a given class is on a non-preferential, first-come-first-served basis.

Fair competition

4. An operator who own or controls a network or other essential facility (Authors' underlining) upon which other competing cooperators depend for the efficient provision of their services, or who has a dominant position in a geographical market specified in its licence, shall not resort to conduct or practices that unfairly disadvantage rival operators or that are calculated to keep out competition such as

(a) limiting access to a network or interconnection;

(b) providing sub-standard access;

(c) permitting access only under onerous terms;

(d) subsidizing competitive services by revenues obtained from non-competitive services;

(e) linking the provision of a monopolized service to the purchase of other services;

(f) the use of fraudulent reporting and spurious accounting declaration and processes to impede the financial commercial growth of competitors or any such act that limits competition; or

(g) unilaterally linking commercial disputes with interconnection issues to cause undue harm and injury to end-users.

Interconnection of border areas

25. Operators of carrier services who provide service to customers located in the country's border areas may, upon the prior written approval of the Authority, enter into special interconnection agreements with the persons providing the same services located within areas of a neighbouring country.

PART VI – INTERCONNECTION OF COMMUNICATION SERVICES

Interconnection between telecom service operators

108. (1) A public telecom service operator shall permit the interconnection of its communications system with that of another public communications service provider in accordance with an agreement between the operators or as determined by the Authority.

(2) Interconnection of a communication system providing private telecom service with a communication system providing public telecom service may be effected by an agreement between the operators or as determined by the Authority.

(3) Interconnection of communication systems of private telecom operators may be effected by an agreement between the operators.

(4) Consent for interconnection shall not be unreasonably withheld.

(5) An operator who acts in breach of subregulation (1) is liable to a fine determined by the Authority.

Use of open architecture design, facilitating access

(1) Public telecom service operators shall use open architecture designs that facilitate interconnection of systems and inter-operation.

(2) Unless otherwise exempted by the Authority and subject to interconnection agreement between the operator and the value added service provider, all operators shall permit unhindered passage of registered value added service within their communications systems and shall not intentionally interfere with such passage.

(3) Subregulation (2) includes the universal recognition of prepaid calling cards in all public telephones of operators.

(4) The access described in subregulations (2) and (3) may be denied on grounds of technical data, national security and public safety and the grounds for the denial of access shall be communicated to the value added service operator.

Access to poles, ducts, conduits and right of way

110. (1) Subject to subregulations (2) and (3), public utility providers, operators of public telecom and cable services shall share space on their radio towers; and public utility providers shall make available to operators access to any pole, duct, conduit or right of way owned or controlled by them without discrimination.

(2) The sharing and access described in subregulation (1) may only be denied on grounds of insufficient capacity, safety, security, reliability or other technical grounds.

(3) The rates, terms and conditions of the access shall be fair, reasonable and based on actual cost to the person permitting the access.

Fair competition on relation to interconnection of public communications service network systems.

Fair competition in relation to interconnection of public communications service network systems.

111. (1) Interconnection of public communication service systems shall be governed by fair competition and for that purpose communications services shall be interconnected under conditions that are among other things equal technically, economically and without discrimination.

(2) Subregulation(1) applies to all operators who provide the same type of service and request interconnection.

Negotiations for interconnection of systems

112. (1) Operators may negotiate among themselves the terms and conditions of interconnection agreements.

(2) The period for interconnection negotiations shall be concluded within 4 months from the date an operator request interconnection.

Interconnection agreements

113. (1) An interconnection agreement shall

(a) be in writing

(b) conform to the principles of fair competition, non-discrimination and universal coverage set out in Part I of these Regulations; and

(c) be executed in accordance with terms and conditions negotiated in good faith.

(2) Every interconnection agreement shall provide for resolution of any dispute arising under the agreement to be resolved by the Authority if not amicably settled between the parties.

(3) The Authority may, at the request of an operator who intends to enter into an interconnection agreement, participate or assist in negotiations for the interconnection agreement.

Submission of interconnection agreement to the Authority

114. (1) A copy of a final interconnection agreement executed under these Regulations shall be submitted to the Authority not later than 10 working days after the effective date of the agreement.

(2) Where the Authority determines that the terms of an interconnection agreement are inconsistent with

(a) the best operation of the public communications network; or

(b) the provisions of the Act or these Regulations;

The Authority shall require the parties to revise the terms and may where this is refused take such action as is permitted under the Act and these Regulations.

PART VIII – SETTLEMENT OF DISPUTES

Sub-Part I – Disputes between Operators

Interconnection disputes

150. Where the operators do not (a) reach an agreement on interconnection negotiations within the period specified in regulation 112(2); or (b) reach an agreement on interconnection dispute arising from interpretation of an interconnection agreement,

Either operator or both may submit a written request to the Authority for settlement within 30 days, failing which an arbitration pursuant section 20(2) of the Act shall be resorted to in accordance with the Arbitration Act, 1961 (Act 38) and upon request).

Types of interconnection disputes to be referred for settlement

151. Interconnection disputes that may be submitted to the Authority include disputes

(a) relating to negotiation of interconnection agreements;

(b) concerning

(i) the implementation, terms, conditions and obligations under interconnection agreements;

(ii) access to network interconnections;

(iii) use or abuse of network interconnections; and

(iv) economic and legal issues relating to network interconnections.

6.2 Ghana: National Communications Authority Act 2008 – Act 769

It covers the setting up of the regulator, the National Communications Authority.

6.3 Ghana: Electronic Communication Act 2009 (Amendment) – Act 786

It covers the implementation of services by the Global Voice Group.

7. Guinea

7.1 Loi L/2005/019/AN du 8 septembre 2005 portant modification des dispositions de la loi L/95/018/CTRN du 18 mai 1995 portant réglementation des radiocommunications en République de Guinée

Covers wireless issues.

8. Guinea-Bissau

No documents obtained. There is a currently operating Communications Act that is waiting to be replaced by another version.

9. Liberia

9.1 Telecommunications Act 2007

Section 27 covers Functions and Duties of LTA Regarding Competition

Section 28 covers Abuse of Dominance

Section 29 covers Other Anti-Competitive Practices

Section 30 covers Determination of Abuse of Dominance and Anti-Competitive Practices

Section 31 covers Remedies for Abuse of Dominance and Anti-Competitive Practices

PART VIII INTERCONNECTION

33. Functions and Duties of the LTA Regarding Interconnection

The LTA shall perform the following functions and duties in relation to interconnection of telecommunications networks:

(a) promote adequate, efficient and cost-oriented interconnection of telecommunications networks and access by service providers to telecommunications facilities of other service providers in order to permit interoperability of telecommunications services that originate or terminate in Liberia and to promote the development of competitive telecommunications service markets;

(b) establish and maintain an open, transparent, non-discriminatory and commercially viable regulatory framework for interconnection and access with a view to minimizing regulatory and other barriers to entry into telecommunications markets;

(c) promote interconnection arrangements, including by facilitating negotiations between the parties to reach interconnection agreements;

(d) ensure that interconnection agreements otherwise meet the objectives of this Act;

(e) determine which service providers are dominant service providers in a telecommunications market for interconnection;

(f) if considered appropriate by the LTA, regulate the prices for interconnection and access services by dominant service providers in a telecommunications market for interconnection;

(g) ensure that dominant service providers in a telecommunications market for interconnection publish a reference interconnection offer in accordance with Section 39 of this Act and any regulations, rules and orders applicable to interconnection;

(h) resolve disputes related to interconnection in a timely and impartial manner; and

(i) make orders specifying the terms of interconnection that shall be provided by one or more LTA service providers in accordance to the LTA regulations, rules and orders.

All sections up to 38 cover Interconnection.

38. Reference Interconnection Offers

(1) Dominant service providers shall:

(a) prepare a reference interconnection offer for approval by the LTA within the time period prescribed by order of the LTA;

(b) periodically update the reference interconnection offer as prescribed by order of the LTA; and

(c) publish its approved reference interconnection offer by:

i) filing a copy with the LTA, who shall publish the reference interconnection offer on the LTA's official web site;

ii) making a copy available to the public in its principal business offices; and

iii) sending a copy to any service provider on request.

(2) Every reference interconnection offer shall:

(a) comply with any regulations, rules or orders issued by the LTA, including any requirements for the form and content of a reference interconnection offer so prescribed; and

(b) include a full list of services to be supplied to service providers, setting out the associated terms and conditions, including the charges for each such service.

39. Publication of Interconnection Agreements

(1) Dominant service providers shall, within ten (10) days after execution of an interconnection agreement, file a copy of the agreement with the LTA.

9.2 Draft Telecommunications (Licensing and Authorization) Regulation LTA–REG–0001 published for comments on March 5, 2008 by Liberia Telecommunciation Authority

This covers the licensing process.

9.3 Telecommunications/ICT Policy, Ministry of Post and Telecommunications, February 2009

18.1 NETWORK EQUAL ACCESS: This Policy supports the notion that all customers shall be afforded equal access to all competing service providers in a market. This means that customers should have the opportunity to choose among the services of all competing providers, without cost penalties or unduly burdensome technical barriers. The cost of providing equal access will be shared on a non-discriminatory basis by all competitors.

19.1 DOMINANT SERVICE PROVIDERS: Dominant service Providers are prohibited from undertaking activities or actions that abuse their dominant position. Operators with significant market power shall be subject to competition regulation, as defined in this Policy, due to their potential ability to adversely influence market competition. The LTA will define regulations to establish what constitutes SMP in relations to product and service definitions, market segments and geographic dimensions. The methodology in determining operators with SMP includes analysis of market shares, control of infrastructure, technological advantages, absence of competition, privileged access to financial resources, bundling of services/products, economies of scale, scope of vertical and/or horizontal integration, distribution network(s) links with other markets and collusion issues.

In general, SMP will be determined to exist for operator(s) providing telecommunications services that controls at least fifty-one (51%) percent of a relevant market segment. PART VII of the Telecommunications ACT of 2007 makes provision for the LTA to establish regulations and guidelines to ensure fair and transparent competition.

26. CO-LOCATION

The policy encourages and promotes the sharing of telecommunication infrastructures by operators/carriers to:

a. Create network redundancy;
b. Maximize services and prevent network outages;
c. Reduce operational cost and ensure affordable services;

33. GLOBAL CONNECTIVITY

The policy is to improve global wireless connectivity, develop land based networks and negotiate access to undersea fibre (SAT3) network by 2013. The MoPT shall be tasked with the responsibility to initiate policy discussions with the MANO River and ECOWAS countries for the deployment of land based and undersea telecommunications infrastructures. The city of Monrovia is approximately 500 miles east from the undersea (SAT3) landing station in Cote d' Ivoire and over 1000 miles west to the Senegal undersea landing station. The four (4) countries (Liberia, Sierra Leone, Cote d'Ivoire, Guinea Republic and Senegal) are either members of the MANO River Union or the ECOWAS.

10. Mali

10.1 Loi n° 01-005 du 27 février 2001 portant modification de l'Ordonnance n° 99-043/P-RM du 30 septembre 1999 régissant les télécommunications en République du Mali

Article 17 (Nouveau): Accès et interconnexion

1. Les opérateurs repris sur la liste établie en vertu de l'article 18 [sic] ci-dessus assurent l'accès à leurs réseaux et/ou services de télécommunications ainsi que l'utilisation des réseaux et/ou de services de télécommunications à tous ceux qui le demandent, à des conditions générales de fournitures fondées sur des critères objectifs, transparents, non-discriminatoires et garantissant l'égalité d'accès. Lorsqu'un opérateur dispose de plusieurs réseaux, il ne peut accorder à son propre réseau un régime d'interconnexion plus favorable que celui qu'il accorde à un autre opérateur. La procédure et les modalités d'interconnexion sont fixées en vertu de la présente ordonnance et d'un décret sur l'interconnexion.

2. Les opérateurs repris sur la liste établie en vertu de l'article 18 [sic] ci-dessus doivent permettre et faciliter l'interconnexion de leur réseau avec d'autres réseaux ou services de télécommunications, pour autant que celle-ci soit techniquement possible. Au cas où l'interconnexion n'est pas techniquement possible, il appartient à l'opérateur auquel l'interconnexion est demandée, d'en donner la preuve. Ils doivent répondre à toutes les demandes raisonnables d'interconnexion, y compris les demandes pour la connexion du réseau en d'autres points que les points de terminaison du réseau offerts à la majorité des utilisateurs finaux et/ou des opérateurs.

3. Le Comité détermine les modalités générales de l'interconnexion, y compris la procédure et les règles permettant la détermination des tarifs, sur la base notamment des principes suivants:

a) Liberté contractuelle des parties concernées, exercée de manière non discriminatoire et transparente.
b) Mise à disposition sans délai des informations et spécifications nécessaires en vue de l'interconnexion.

c) Détermination des tarifs d'interconnexion fondés sur des critères objectifs, transparents et orientés sur les coûts déterminés sur la base d'un système de comptabilisation approprié.

10.2 Ordonnance n° 99-043/P-RM du 30 septembre 1999 régissant les télécommunications en République du Mali

Section 2 – Interconnexion

Article 17: Accès et interconnexion

(1) Les opérateurs repris sur la liste établie en vertu de l'article 16 ci-dessus assurent l'accès à leurs réseaux et/ou services de télécommunications ainsi que l'utilisation des réseaux et/ou de services de télécommunications à tous ceux qui le demandent, à des conditions générales de fournitures fondées sur des critères objectifs, transparents, non-discriminatoires et garantissant l'égalité d'accès. Lorsqu'un opérateur dispose de plusieurs réseaux, il ne peut accorder à son propre réseau un régime d'interconnexion plus favorable que celui qu'il accorde à un autre opérateur.

(2) Les opérateurs repris sur la liste établie en vertu de l'article 16 ci-dessus doivent permettre et faciliter l'interconnexion de leur réseau avec d'autres réseaux ou services de télécommunications, pour autant que celle-ci soit techniquement possible. Ils doivent répondre à toutes les demandes raisonnables d'interconnexion, y compris les demandes pour la connexion du réseau en d'autres points que les points de terminaison du réseau offerts à la majorité des utilisateurs finaux et/ou des opérateurs.

(3) Le Comité détermine les modalités générales de l'interconnexion, y compris la procédure et les règles permettant la détermination des tarifs, sur la base notamment des principes suivants:

a) Liberté contractuelle des parties concernées, exercée de manière non discriminatoire et transparente.

b) Mise à disposition sans délai des informations et spécifications nécessaires en vue de l'interconnexion.

c) Détermination des tarifs d'interconnexion fondés sur des critères objectifs, transparents et orientés sur les coûts déterminés sur la base d'un système de comptabilisation approprié.

Article 18: Offre d'interconnexion de référence

(1) Les opérateurs sont tenus d'établir et d'utiliser une offre d'interconnexion de référence indiquant les modalités techniques et financières pour la fourniture des principaux services d'interconnexion.

(2) Le Comité approuve l'offre d'interconnexion de référence des opérateurs repris sur la liste selon les modalités et la procédure qu'il détermine. En cas de désaccord entre celui-ci et l'opérateur, il est habilité à déterminer le contenu de l'offre d'interconnexion de référence.

(3) L'offre d'interconnexion de référence des opérateurs repris sur la liste établie en vertu de l'article 16 de la présente ordonnance, doit être publiquement disponible sur simple demande auprès de chaque opérateur.

10.3 Décret n° 00-226/P-RM du 10 mai 2000 déterminant les modalités de déclaration pour l'établissement de réseaux et/ou l'exploitation de services de télécommunications soumis à déclaration

Mentions Conditions of Access in a single line as one thing that will be covered.

10.4 Décret n° 00-229/P-RM du 10 mai 2000 relatif au partgae des infrastructures de télécommunications

Article 2: Définitions

(1) Au sens du présent décret, on entend par:

Ordonnance: L'ordonnance N° 99-043/P-RM du 30 Septembre 1999 régissant les télécommunications en République du Mali;

Demandeur: opérateur demandant de partager l'infrastructure ou une partie de celle-ci, d'un autre opérateur.

Article 3: Demande de partage d'infrastructures

Conformément à l'article 41 de l'ordonnance, lorsqu'un opérateur souhaite partager l'infrastructure de télécommunications ou une partie d'infrastructure de télécommunications d'un autre opérateur, il formule sa demande par écrit et l'envoie par recommandé avec accusé de réception ou la dépose en mains propres moyennant remise d'un accusé de réception. La demande contient une description détaillée des éléments d'infrastructures pour lesquels le partage est demandé. Elle contient aussi toutes les questions précises relatives à l'infrastructure auxquelles le demandeur souhaite obtenir une réponse.

Article 4: Réponse à la demande

L'opérateur qui reçoit la demande de partage d'infrastructure s'efforce, dans un délai de 30 jours calendaire, de sa réception d'y répondre en proposant les termes et conditions du partage, notamment en ce qui concerne le prix, la durée, la responsabilité et l'organisation des travaux. L'opérateur qui reçoit des demandes de partage d'infrastructures s'efforcera d'y répondre en respectant les principes d'orientation vers les coûts, de transparence et de non discrimination. L'opérateur qui accepte le partage d'infrastructures l'accordera, si possible, aux endroits demandés. L'accord de partage d'infrastructures sera de préférence écrit.

Article 5: Conciliation

En cas de refus de partage d'infrastructures, le demandeur peut solliciter l'intervention du CRT comme conciliateur.

10.5 Décret n° 00-230/P-RM du 10 mai 2000 relatif à l'interconnexion dans le secteur des télécommunications

En vertu de l'article 17(1) de l'ordonnance N° 99-043/P-RM du 30 Septembre 1999 régissant les télécommunications en République du Mali, les opérateurs classés sur la liste établie en vertu de l'article 6 de cette ordonnance, ont l'obligation d'assurer l'accès à leurs réseaux et/ou services de télécommunications à tous ceux qui le demandent, à des conditions générales de fournitures fondées sur des critères objectifs, transparents, non-discriminatoires et garantissant l'égalité d'accès. A cette fin, les opérateurs puissants négocient et concluent des contrats ou accords d'interconnexion.

Section 1: Définitions

Article 1er

(1) Au sens du présent décret, on entend par:

Ordonnance: L'ordonnance N° 99-043/P-RM du 30 Septembre 1999 régissant les télécommunications en République du Mali;

Demandeur: Opérateur demandant la conclusion ou ayant conclu un contrat d'interconnexion pour ses réseaux et/ou services avec un opérateur puissant.

Opérateur puissant: Opérateur figurant sur la liste des opérateurs établie en vertu de l'article 16 de l'ordonnance considérés comme puissant par le Ministre en vertu de cette disposition.

OIR: Offre d'Interconnexion de Référence décrivant les conditions techniques et tarifaires d'interconnexion ainsi que les services standards d'interconnexion, telle qu'approuvée par le CRT;

Section 2: Objet

Article 2

(2) Lorsqu'il est amené à intervenir pour assurer une interconnexion adéquate par ou en vertu du présent décret, le CRT tient notamment compte de:

…

- la nécessité d'encourager l'émergence et le développement d'un marché compétitif;
- la nécessité de promouvoir l'établissement et le développement des réseaux et/ou services de télécommunications au Mali, l'interconnexion des réseaux nationaux et l'interopérabilité des services, ainsi que l'accès à ces réseaux et/ou services;
- les principes de transparence, de non-discrimination et de proportionnalité;
- la détermination des tarifs fondés sur des critères d'objectivité, de transparence, de non-discrimination et orientés sur les coûts;

Chapitre 2: Principes s'appliquant à tous les opérateurs

Article 3

(1) L'interconnexion fait en principe l'objet d'un contrat de droit privé librement négocié entre les parties. Sont visés également les accords écrits ou oraux que les opérateurs concluent avec ou entre leurs filiales, partenaires ou services.

(2) Les opérateurs communiquent au CRT une copie de tout contrat ou accord d'interconnexion, dans les 15 jours suivant la conclusion. Les opérateurs indiquent au CRT les dispositions de leurs contrats qu'ils considèrent comme confidentielles parce qu'elles contiennent des indications quant à la politique commerciale des opérateurs concernés. Le CRT se réserve le droit de juger si les informations ainsi proposées sont considérées comme étant confidentielles.

Article 5

Toute demande d'interconnexion est formulée par écrit et adressée par lettre recommandée à l'opérateur des réseaux et/ou des services avec lequel l'interconnexion est demandée. Cette demande indique au minimum les éléments suivants:

- la date de mise en service commerciale de l'interconnexion envisagée; et
- le détail des services d'interconnexion demandés.

Chapitre 3: Principes s'appliquant aux opérateurs puissants

Section 1: Offre d'interconnexion de référence

Article 6

(1) Conformément à l'article 18(1) de l'ordonnance et afin de réaliser les objectifs de l'article 2 ci-dessus, les opérateurs puissants sont tenus de répondre favorablement à toute demande raisonnable d'interconnexion, pour autant que celle-ci soit techniquement possible, y compris les demandes pour la connexion au réseau en d'autres points que les points de terminaison du réseau offerts à la majorité des utilisateurs finaux. Par ailleurs, les opérateurs puissants sont tenus de publier une offre d'interconnexion de référence OIR), approuvée par le CRT préalablement à sa publication.

c) service de liaisons d'interconnexion

- Service de liaisons d'interconnexion en ligne
- Service de liaisons d'interconnexion, colocation auprès de l'offrant
- Service de liaisons d'interconnexion, colocation auprès du demandeur

f) l'indication de la localisation des sites d'interconnexion, la description de leurs fonctionnalités techniques y compris les conditions d'accès à ces points et les informations de taxation fournies à l'interface d'interconnexion;

g) l'indication des normes ou standards utilisés qui, en principe, ne peuvent pas déroger aux normes ou standards internationaux;

h) les conditions tarifaires pour les services d'interconnexion.

i) une description de la procédure de tests;

j) une description complète des interfaces d'interconnexion proposées et notamment le protocole de signalisation et éventuellement les méthodes de chiffrement utilisé à ces interfaces; et

k) l'indication des délais maximum dans lesquels l'interconnexion sera mise en service.

(3) La liste reprise au paragraphe (2) ci-dessus est sans préjudice du droit du CRT de modifier au cas par cas la liste des services d'interconnexion devant figurer dans la OIR d'un opérateur puissant.

Section 2: Contrat d'interconnexion type

Article 8

(1) Les opérateurs puissants préparent un contrat type d'interconnexion, servant de base de négociation pour leurs contrats d'interconnexion.

(2) Ces contrats déterminent au moins les éléments suivants:

- les relations commerciales et financières entre les parties et notamment les procédures de facturation et de recouvrement ainsi que les conditions de paiement;
- les procédures à appliquer en cas de proposition d'évolution de l'offre d'interconnexion par l'une des parties ou en cas de demande d'un nouveau service d'interconnexion (qu'il soit ou non offert par l'opérateur puissant);
- la durée et les conditions de renégociation de la contrat d'interconnexion;
- les transferts d'information indispensables entre les deux opérateurs et la périodicité ou les délais dans lesquels ces informations doivent être communiquées;
- le détail des services d'interconnexion;
- les mesures visant à garantir l'intérêt général, notamment la sécurité des usagers et du personnel exploitant des réseaux de télécommunications, la protection des réseaux et plus particulièrement des échanges d'information de commande et de gestion qui y sont associés,

l'interopérabilité des services et celle des équipements terminaux et la protection des données, le cas échéant la bonne utilisation du spectre radioélectrique.;

- les échanges mutuels d'informations et les préavis requis lors de modifications du système d'un opérateur interconnecté contraignant l'autre opérateur interconnecté à adapter ses propres installations;
- la désignation des points d'interconnexion et la description des modalités techniques pour s'y interconnecter;
- les modalités de prévision de trafic, de routage et d'implantation des interfaces d'interconnexion et les délais de livraison des liens d'interconnexion;
- les essais préalables à la mise en service définitive de l'interconnexion ou de modifications ultérieures
- les modalités de dimensionnement réciproques des équipements utilisés pour permettre l'interconnexion;
- les mesures mises en œuvre pour réaliser l'égal accès des usagers aux différents réseaux et services;
- les procédures d'intervention et de relève de dérangements;
- les définitions et limites en matière de responsabilité et d'indemnisation entre les opérateurs;
- les aménagements du droit commun en cas de manquements contractuels;
- les éventuels droits de propriété intellectuelle; et
- les clauses de confidentialité.

Section 4: Non discrimination

Article 12

Tout opérateur puissant fournit l'interconnexion dans des conditions non discriminatoires. L'obligation de non discrimination concerne notamment les conditions techniques et financières d'interconnexion telles que les délais de mise à disposition des services d'interconnexion, l'accès à l'information relative à l'offre de nouveaux services d'interconnexion, la qualité technique des prestations et la disponibilité des prestations. L'opérateur puissant ne peut pas opérer de façon discriminatoire en faveur de ses propres services ou filiales, ni entre tiers.

Section 5: Détermination des tarifs d'interconnexion

Article 13

(1) Les tarifs d'interconnexion des opérateurs puissants doivent respecter les principes de la transparence et d'orientation en fonction des coûts d'un opérateur efficient en situation de concurrence. La charge de la preuve que les tarifs y correspondent incombe à l'opérateur puissant qui fournit l'interconnexion de ses installations.

(2) Les tarifs doivent être suffisamment décomposés, de sorte que le demandeur n'est pas tenu de payer pour un élément qui n'est pas strictement lié au service demandé.

(3) En l'absence d'éléments comptables probants, le CRT se réserve le droit de fonder son évaluation du caractère transparent et orienté en fonction des coûts des services d'interconnexion sur les études ou informations de coûts qu'il juge fiables. Le cas échéant, le CRT fonde son évaluation sur la base de références internationales en particulier des pays de la sous région. (Authors' emphasis)

Article 14

(1) Tous les tarifs des services d'interconnexion offerts par les opérateurs puissants, rémunèrent l'usage effectif du réseau de transport et de desserte et reflètent les coûts correspondants. Ces opérateurs puissants doivent être en mesure de montrer que leur tarif d'interconnexion reflète effectivement les coûts.

(2) Le CRT peut demander aux opérateurs puissants tout élément d'information lui permettant d'apprécier si leurs tarifs d'interconnexion sont orientés en fonction des coûts,notamment dans le cas où les prestations contenues dans les contrats d'interconnexion ne figurent pas dans l'OIR.

(3) Les tarifs d'interconnexion des opérateurs puissants doivent reposer sur les principes suivants:

- les coûts pris en compte doivent être pertinents, c'est à dire liés par une forme de causalité, directe ou indirecte, au service d'interconnexion rendu;
- les coûts pris en compte doivent tendre à accroître l'efficacité économique à long terme, c'est à dire que les coûts considérés doivent prendre en compte les investissements de renouvellement de réseau, fondés sur la base des meilleures technologies industriellement disponibles et tendant à un dimensionnement optimal du réseau, dans l'hypothèse d'un maintien de la qualité de service;
- les tarifs incluent une contribution équitable, conformément au principe de proportionnalité, aux coûts qui sont communs à la fois aux services d'interconnexion et aux autres services, dans le respect des principes de pertinence des coûts et de l'équilibre économique de l'opérateur puissant;
- les tarifs incluent une rémunération normale des capitaux employés pour les investissements utilisés fixée suivant les conditions de l'article 17 ci-dessous;
- les tarifs peuvent faire l'objet d'une modulation horaire pour tenir compte de la congestion des capacités de transmission et de commutation du réseau général de l'opérateur;
- les tarifs unitaires applicables pour un service d'interconnexion sont indépendants du volume ou de la capacité des éléments du réseau général utilisée par ce service;
- les unités de tarification doivent correspondre aux besoins des opérateurs interconnectés.

Article 15

Pour la détermination des coûts, les opérateurs puissants sont tenus de respecter les règles d'allocation de coûts suivantes:

(1) Les coûts spécifiques aux services d'interconnexion sont entièrement alloués aux services d'interconnexion.

(2) Les coûts spécifiques aux services de l'opérateur puissant autres que l'interconnexion sont exclus de l'assiette des coûts des services d'interconnexion. Sont en particulier exclus les coûts de l'accès (boucle locale) et les coûts commerciaux (publicité, marketing, ventes, administration des ventes hors interconnexion, facturation et recouvrement hors interconnexion).

(3) Les coûts de réseau général sont partagés entre les services d'interconnexion et les autres services sur la base de l'usage effectif du réseau général par chacun de ces services.

(4) Les coûts communs pertinents au regard de l'activité d'un opérateur de télécommunications sont partagés entre services d'interconnexion et services autres que ceux d'interconnexion.

Article 16

Pour évaluer les tarifs d'interconnexion des opérateurs puissants, le coût des capitaux propres est fixé en tenant compte du modèle d'évaluation d'actifs financiers (MEDAF), qui repose sur la formule suivante:

$$ke = Rf + \beta (Rm - Rf)$$

- le taux sans risques Rf
- la prime de marché (Rm – Rf)
- le risque spécifique de l'investissement β

Le coût de la dette est déterminé à partir du taux sans risque Rf auquel s'ajoute une prime de risque de la dette de l'entreprise. Le coût du capital est la moyenne pondérée des deux valeurs ainsi calculées.

MUCH MORE ON METHODOLOGY FOR COST CALCULATION, PROCESS AND DISPUTE RESOLUTION

10.6 Déclaration de Politique Sectorielle (DPS) du 28 Juin 2000

III OBJECTIFS DE LA POLITIQUE SECTORIELLE

- Offrir des services variés et de bonne qualité à des prix concurrentiels qui soient plus orientés vers les coûts réels;
- Augmenter les investissements productifs privés, nationaux et internationaux dans le secteur des télécommunications;
- Construire un réseau national de télécommunications fiable et connecté aux autoroutes de l'information;
- Promouvoir les télécommunications comme secteur économique essentiel à l'essor d'une économie compétitive, ouverte au monde et où le secteur des services représente une part importante du P.I.B.;

IV.1 Ouverture du secteur des télécommunications à la concurrence

Le premier axe stratégique qui est la clé de voûte de la réforme du secteur des télécommunications consiste à la réalisation de l'ouverture du secteur à travers la mise en place d'un nouveau cadre juridique et réglementaire. C'est dans ce cadre que le Gouvernement a adopté i) l'Ordonnance N°99-043/P-RM du 30 Septembre 1999 régissant les télécommunications en République du Mali; ii) l'Ordonnance N°00-028/P-RM du 29 Mars 2000 portant modification de l'Ordonnance N°99-043/P-RM; et iii) les décrets N°00-226/P-RM, 00-227/P-RM, 00-228/P-RM, 00-229/P-RM et 00-230/P-RM tous du 10 Mai 2000 portant respectivement sur i) les modalités de déclaration pour l'établissement de réseaux et/ou l'exploitation de services de télécommunications soumis à déclaration; ii) les modalités de fonctionnement du Comité de Régulation des Télécommunications; iii) les critères et procédures d'octroi de licences de télécommunications; iv) le partage des infrastructures de télécommunications; et v) l'interconnexion dans le secteur des télécommunications. (Authors' underlining)

11. Mauritania

11.1 Loi n° 99-019 portant sur les télécommunications

Section 1 – Définitions Article 1er: Au sens de la présente loi, on entend par:

- Interconnexion: les liaisons physiques, logiques et commerciales entre des réseaux de télécommunications ouverts au public permettant à l'ensemble des utilisateurs de communiquer librement entre eux, quels que soient les réseaux auxquels ils sont raccordés ou les services qu'ils utilisent.

Article 20: Les opérateurs sont tenus d'observer les principes et règles en vigueur et notamment:

….

- Le principe de non discrimination;

Section 3 – Interconnexion

Article 39: L'Autorité de Régulation détermine les conditions générales d'interconnexion, notamment celles liées aux exigences essentielles, et les principes de tarification auxquels les accords d'interconnexion doivent satisfaire.

Afin de garantir une concurrence effective et loyale entre les opérateurs, au bénéfice des utilisateurs, l'Autorité de Régulation s'assure notamment que les conditions d'accès aux réseaux ou services ouverts au public et d'interconnexion de ces réseaux garantissent la possibilité pour tous les utilisateurs d'un réseau ou d'un service ouverts au public, de communiquer avec les utilisateurs d'un autre réseau ou d'un autre service ouverts au public, d'avoir accès à des services fournis par un autre opérateur et ainsi de communiquer librement.

L'Autorité de Régulation s'assure que l'interconnexion avec un fournisseur principal est assurée, en tous points du réseau où cela est techniquement possible et établie en temps opportun, suivant des modalités et à des conditions non discriminatoires.

L'Autorité de Régulation s'assure que les tarifs d'interconnexion sont non discriminatoires, transparents, raisonnables et reflètent le coût d'interconnexion. Au cas où la satisfaction de la demande d'interconnexion requiert des installations additionnelles du fournisseur principal, les coûts de ces installations additionnelles, à la charge du demandeur, doivent être suffisamment détaillés pour que celui-ci n'ait pas à payer pour des éléments ou installations du réseau dont il n'a pas besoin pour les services à fournir. Toutefois, le fournisseur de l'interconnexion peut, dans des conditions qui ne faussent pas le jeu de la concurrence, réaliser ladite interconnexion sans imputer les coûts des installations additionnelles au demandeur. L'interconnexion doit garantir un service de qualité comparable à celle des services des fournisseurs non affiliés, des filiales ou autres sociétés affiliées.

L'Autorité de Régulation s'assure que le public a accès aux procédures applicables en matière d'interconnexion. L'Autorité de Régulation s'assure que l'opérateur des télécommunications issu de l'OPT satisfait à l'obligation de publicité de son offre d'interconnexion de référence et ses accords particuliers d'interconnexion.

Article 40: Les exploitants de réseaux ou services ouverts au public font droit, dans des conditions objectives, transparentes et non discriminatoires, aux demandes d'interconnexion écrites des autres opérateurs. La réponse est formulée par écrit dans un délai maximal d'un mois à compter de la date de dépôt de la demande d'interconnexion.

La demande d'interconnexion ne peut être refusée si elle est raisonnable au regard, d'une part, des besoins du demandeur, d'autre part, de la capacité de l'opérateur à la satisfaire. Le refus d'interconnexion est motivé. Il est formulé par écrit et doit intervenir dans un délai maximal d'un mois à compter de la date de dépôt de la demande d'interconnexion.

…

Article 42: Le catalogue d'interconnexion contient des conditions différentes pour répondre, d'une part, aux besoins d'interconnexion des exploitants de réseaux ouverts au public et, d'autre part, aux besoins d'accès au réseau des fournisseurs des services ouverts au public compte tenu des droits et obligations propres à chacune de ces catégories d'opérateurs.

Il doit être établi pour une liste de segments du réseau, dressée par l'Autorité de Régulation. Ces segments peuvent être demandés par les autres opérateurs. Ils sont délimités par les points d'interconnexion possibles, qui peuvent être le poste de l'abonné appelant ou appelé, les centres locaux et les centres de transit, ou tout autre point d'interconnexion possible entre opérateurs.

Les tarifs d'interconnexion rémunèrent l'usage effectif du réseau de transport et de desserte et reflètent les coûts correspondants. Pour chaque segment, l'opérateur doit établir un coût d'interconnexion basé sur le coût de revient. Les opérateurs fournissent à l'Autorité de Régulation les éléments comptables nécessaires pour l'estimation des coûts d'interconnexion. En cas de surestimation manifeste des coûts d'interconnexion, l'Autorité de Régulation peut faire auditer, par un cabinet indépendant, la comptabilité de l'opérateur concerné aux frais de celui-ci.

11.2 Décret n° /2000/128/PM/MIPT/ du 4 novembre 2000 relatif à l'étendue et la durée de l'exclusivité transitoire accordée à Mauritel

CHAPITRE 2 – PORTEE DE L'EXCLUSIVITE:

Article 3: A compter du 30 juin 2004, l'établissement et l'exploitation de réseaux et services de télécommunications sur le territoire de la République Islamique de Mauritanie sont pleinement ouverts à la concurrence, sous réserve de la détention des licences et autorisations prévues par la loi.

11.3 Loi n° 2001-18 portant sur l'Autorité de régulation multisectorielle

Law to set up multi-sector regulator.

11.4 Décret n° 2000.163 /PM/MIPT portant définition des conditions générales d'interconnexion des réseaux et services de télécommunications

TITRE I: PRINCIPES GENERAUX

Article 1: Les définitions figurant à l'article 1 de la loi n° 99-019 relative aux télécommunications sont applicables pour l'interprétation du présent décret. En outre, pour l'application du présent décret, on entend par:

a) opérateur en position dominante: tout opérateur de réseau de télécommunications qui détient une part supérieure à 25% du marché des télécommunications, ainsi que tout opérateur de réseau de telecommunications dont l'Autorité de Régulation détermine qu'il exerce une influence significative sur le marché des télécommunications, conformément à l'article 16 de la loi n°99-019 du 11 juillet 1999 relative aux telecommunications;

b) point d'interconnexion: lieu où un opérateur de réseau de télécommunications établit les équipements d'interface permettant l'interconnexion avec les opérateurs des autres réseaux;

c) liaison d'interconnexion: la liaison de transmission (filaire, radioélectrique ou autre) reliant le réseau d'un opérateur au point d'interconnexion d'un fournisseur d'interconnexion;

d) services ou réseaux compatibles: services ou réseaux présentant suffisamment de similitudes pour pouvoir être interconnectés. Par exemple, le service (réseau) téléphonique est compatible avec d'autres services (télécopie, transmissions de données sur réseau commuté, etc.) mais pas avec le service (réseau) télex.

Article 5: L'interconnexion fait l'objet d'une convention de droit privé entre les parties concernées, conformément aux dispositions des textes applicables. Cette convention détermine les conditions techniques et financières de l'interconnexion.

La convention d'interconnexion fait référence au catalogue d'interconnexion préparé chaque année par l'opérateur mettant à disposition l'interconnexion. Ce document est public et publié après approbation de l'Autorité de régulation.

Article 6: Les opérateurs de réseaux de télécommunications ouverts au public assurant une couverture urbaine, nationale et/ou des liaisons internationales sont tenus d'offrir un service de location de capacité aux opérateurs de réseaux de télécommunications ouverts au public. Les conditions techniques et tarifaires de cette offre de location de capacité figurent dans leur catalogue d'interconnexion. (Authors' underlining)

Article 7: La Société Mauritanienne des Télécommunications (Mauritel) est tenue de satisfaire, durant la période de transition prévue à l'article 18 du présent décret, toutes les demandes de location de capacité sur des liaisons de ses réseaux urbains et de son réseau de transmission national formulées par les opérateurs de réseaux ouverts au public, dans la limite de leur disponibilité. Son cahier des charges précisera les délais de mise en place des infrastructures nécessaires au respect de cette obligation et les dispositions transitoires applicables pendant la période intérimaire.

Article 11: Chaque point d'interconnexion est choisi par l'opérateur demandeur de l'interconnexion parmi les points d'interconnexion figurant au catalogue de l'opérateur fournisseur d'interconnexion. Les opérateurs fournisseurs d'interconnexion sont tenus d'établir des points d'interconnexion pour les exploitants de réseaux et pour les fournisseurs de services dans toutes les localités où ils exploitent des systèmes de commutation disposant de l'autonomie d'acheminement. En outre, ils sont tenus d'établir des points d'interconnexion pour les fournisseurs de services dans les localités où ils disposent de réseaux de raccordement d'abonnés.

….

Avant la mise en œuvre effective de l'interconnexion, les interfaces font l'objet d'essais définis conjointement et réalisés sur site par les deux opérateurs concernés. Dans le cas où les essais d'interconnexion ne s'effectueraient pas dans des conditions techniques et de délais normaux, l'une ou l'autre des parties peut saisir l'Autorité de régulation.

TITRE IV: CONVENTIONS D'INTERCONNEXION

Article 15: Les conventions d'interconnexion précisent:

….

- au titre de la description des services d'interconnexion fournis et des rémunérations correspondantes:

…..

– les conditions de partage des installations liées au raccordement physique des réseaux;

….

- au titre des modalités de mise en œuvre de l'interconnexion

– les conditions de mise en service des prestations, les modalités de prévision de trafic et d'implantation des interfaces d'interconnexion, procédure d'identification des extrémités de liaisons louées, délais de mises à disposition,

– la désignation des points d'interconnexion et la description des modalités physiques pour s'y interconnecter,

– les modalités de dimensionnement réciproque des équipements d'interface et des organes communs dans chaque réseau afin de maintenir la qualité de service prévue par la convention d'interconnexion et le respect des exigences essentielles,

– les modalités d'essai de fonctionnement des interfaces et d'interopérabilité des services,

– les procédures d'intervention et de relève de dérangement.

TITRE V: TARIFS D'INTERCONNEXION

Article 16: Les tarifs d'interconnexion et de location de capacité sont établis dans le respect du principe d'orientation vers les coûts, conformément à l'article 42 de la loi n° 99-019 relative aux télécommunications. A cet effet, les opérateurs mettront en place une comptabilité analytique qui leur permettra d'identifier les différents types de coûts suivants:

a) les coûts de réseau général, c'est-à-dire les coûts relatifs aux éléments de réseaux utilisés à la fois par l'opérateur pour les services à ses propres utilisateurs et pour les services d'interconnexion ou de location de capacité;

b) les coûts spécifiques aux services d'interconnexion, c'est-à-dire les coûts directement induits par les seuls services d'interconnexion ou de location de capacité;

c) les coûts spécifiques aux services de l'opérateur autre que l'interconnexion, c'est-à-dire les coûts induits par ces seuls services. Les coûts spécifiques d'interconnexion.

Article 17: La tarification comprend deux éléments:

a) une partie fixe fonction de la capacité mise en œuvre,

b) une partie variable fonction du trafic écoulé.

La partie fixe correspond aux frais d'établissement et/ou de raccordement ainsi qu'aux frais d'exploitation et d'entretien indépendants du trafic. Les frais d'établissement et/ou de raccordement peuvent être payés en une seule fois à la mise en place de l'interconnexion ou de son extension. Ils font, le cas échéant, l'objet d'un devis. Les frais d'exploitation et d'entretien, y compris l'amortissement des équipements utilisés pour l'interconnexion, sont payés sous forme de versements périodiques.

La partie variable se différencie selon que le trafic est local, national ou international, ou encore acheminé d'interconnexion.

It includes an annex on litigation including a flow chart that looks at possible conciliation routes.

11.4 Décision N° 007/09/AR/CNR/PR de l'Autorité de Régulation en date du 15 septembre 2009 se prononçant sur un différend entre Mattel SA et Chinguitel SA relatif au partage d'infrastructures (Decision070909.pdf)

Vu la loi 2001-18 du 25 janvier 2001 portant sur l'Autorité de Régulation Multisectorielle;

Vu la loi 99-019 du 11 juillet 1999 relative aux télécommunications;

Vu le décret 2000-163 du 31 décembre 2000 portant définition des conditions générales d'interconnexion des réseaux et services de télécommunications;

Vu l'arrêté R133 du 28 février 2001, définissant les modalités de règlement des différends entre opérateurs et entre opérateurs et personnes physiques;

Vu la convention d'interconnexion entre Mattel SA et Chinguitel SA en date du 10 juillet 2007;

Les parties ayant été entendues en audience contradictoire le 8 septembre 2009 conformément aux dispositions de l'article 23 du décret 2000-163 du 31 décembre 2000;

Vu le procès verbal du Conseil National de Régulation N°: CNR/05/09 du 13 septembre 2009.

- La demande de Mattel SA au présent litige peut être résumée comme suit:

o Mattel SA demande à Chinguitel SA:

a) La location des capacités de transmission détaillées en annexe 2 ci-jointe.

b) La co-localisation dans les sites cités en annexe 2 ci- jointe.

o Mattel SA demande, par ailleurs, à l'ARE de soumettre Chinguitel SA à une astreinte journalière de 2 000 000 UM.

EN CONSEQUENCE, L'AUTORITE DE LA REGULATION A DECIDE DE CE QUI SUIT:

Article 1er:

Chinguitel SA doit répondre favorablement à la demande de Mattel SA, en terme de capacité de transmission et de co-localisation, dans les sites et sur les liens de transmission cités en annexe 3 ci-jointe.

Article 2:

La demande de Mattel SA ne peut pas être satisfaite par Chinguitel SA, en terme de capacité de transmissions et de co-localisation, dans les sites et sur les liens de transmission cités en annexe 4 ci-jointe.

Article 3:

Chacune des parties est chargée de la mise en œuvre de la présente décision et de notifier à l'Autorité de Régulation toute mesure qui sera prise à cet effet, étant rappelé que les décisions de l'Autorité de Régulation sont exécutoires dès leur notification.

Two other decisions on sharing infrastructure:

Décision N° 008/09/AR/CNR/PR de l'Autorité de Régulation

And

Décision N° 009/09/AR/CNR/PR de l'Autorité de Régulation

11.5 Catalogue d'Interconnexion de Mattel pour 2010-2011

Interconnexion Agreement: Mattel

Specifies charges for air conditioned equipment rooms and traffic charges.

1. Introduction

Le présent catalogue d'interconnexion répond à une obligation réglementaire définie par le Décret 2000-163-PM – MIPT qui stipule que les exploitants de réseaux de télécommunications ouverts au public (ERTP) sont tenus de publier un catalogue d'interconnexion comportant les offres de service, leurs conditions techniques et leurs tarifs.

Le catalogue d'interconnexion de MATTEL définit les conditions techniques, commerciales et administratives dans lesquelles les autres ERTP peuvent s'interconnecter à son réseau. Le catalogue porte sur les services d'interconnexion que MATTEL propose aux ERTP, afin que tous les usagers des services de réseaux interconnectés puissent communiquer librement entre eux.

2. Dispositions Générales

L'interconnexion avec les ERTP est régie par le décret n° 2000.163/PM/MIPT portant définition des conditions générales d'interconnexion des réseaux et services de télécommunications. La procédure des demandes d'interconnexion est réglementée par l'article 4 du décret précité.

MATTEL et le ERTP mettront en œuvre les modalités de planification, de programmation et de réalisation des interconnexions permettant de garantir la capacité nécessaire au trafic d'interconnexion ainsi que la qualité de celle-ci. Ces modalités seront précisées dans une convention d'interconnexion qui sera passée entre les deux parties.

3. Dispositions Techniques

3.1 Les points d'interconnexion: MATTEL dispose actuellement d'un seul point d'interconnexion. (Authors' underlining)

3.2 Les points d'interconnexion et les conditions d'accès physique à ces points:

MATTEL répondra à toute demande d'interconnexion dans les délais prescrits dans la loi en précisant les possibilités techniques ainsi que les délais éventuels pour la réalisation d'une interconnexion. MATTEL met à la disposition de tout ERTP qui demande de s'interconnecter à son réseau et sur la base des prévisions de trafic qu'il fournira, le nombre d'interface de liaison à 2Mbps, dont il a besoin (dans la limite des possibilités techniques) sur ses MSC. (Authors' underlining)

Aussi, l'offre de service dépend des capacités du système de signalisation et des interfaces électriques. Chaque ERTP est responsable du dimensionnement des liaisons d'interconnexion nécessaires pour écouler son propre trafic.

Un ERTP s'interconnectant au réseau de MATTEL est responsable du dimensionnement des faisceaux transportant le trafic d'interconnexion directe, qui s'écoule de son réseau jusqu'aux points d'interconnexion sur le réseau de MATTEL.

3-7-1 Maintenance du réseau – Essais

Chacune des parties est responsable de la gestion, des tests et de l'entretien de ses propres installations et des équipements de son réseau. Chaque partie peut, aux fins de maintenance, interrompre partiellement le fonctionnement de son réseau après un préavis de quatre vingt dix (90) jours notifié à l'autre partie et à l'Autorité de Régulation. Au cas où cette interruption pourrait perturber l'écoulement du trafic avec le réseau de l'autre partie, la partie à l'origine de l'interruption convient de mettre tout en œuvre pour minimiser ces perturbations.

3-7-2 Équipements d'interconnexion

La partie qui demande l'interconnexion convient que les équipements devant être connectés sur le réseau de MATTEL seront conformes aux spécifications applicables de l'UIT et de l'ETSI. Cette partie convient qu'elle effectuera, à ses propres frais, les changements nécessaires sur son réseau pour être compatible avec le réseau de MATTEL. Un plan de test de conformité doit être établi par les deux parties avant la mise en service de l'interconnexion.

3-7-3 Equipements en Co-localisation

Dans les sites où la co-localisation est techniquement possible, compte tenu des contraintes liées à l'accès aux bâtiments, chaque partie assurera l'exploitation et la maintenance de ses équipements qui seront hébergés dans les salles techniques de MATTEL. Les équipements hébergés doivent respecter les normes techniques fixées par MATTEL dans la convention d'interconnexion.

Ces normes font, en général, référence aux spécifications de l'ETSI et UIT, tout en tenant compte de la spécificité de l'environnement Mauritanien. Ces normes couvrent les aspects suivants:

- Conformité aux interfaces,
- Conformité à l'environnement (climatique, électromagnétique, électrostatique, alimentation par convertisseurs, câblage des masses).

4.3. Partage d'infrastructures (Co-localisation)

MATTEL possède un ensemble d'infrastructures pouvant être offertes comme services de co- localisation aux autres ERTP.

11.5 Catalogue d'Interconnexion de Mauritel pour 2010

Identical Interconnection Agreement from Mauritel, fixed line incumbent

11.5 Catalogue d'Interconnexion de Chinguitel pour 2011

Almost identical Interconnection Agreement from Chinguitel, mobile operator owned by Sudatel

2.2 Services de location de capacités et de colocalisation

Chinguitel offre également des services de location de capacités de transmission ainsi que des services de partage d'infrastructures en fonction des disponibilités indiquées en annexe n°2.

12. Niger

12.1 Ordonnance n° 99-044 du 26 octobre 1999 portant création, organisation et fonctionnement d'une Autorité de Régulation Multisectorielle

It covers the setting up of the regulator and its powers.

12.2 Ordonnance n° 99-045 du 26 octobre 1999 portant réglementation des Télécommunicaitons

Article 11 – Interconnexion

Afin de garantir une concurrence effective et loyale entre les opérateurs au bénéfice des utilisateurs. L'Autorité de Régulation s'assure du respect des règles d'interconnexion conformément à l'articles 38 et suivants de la présence ordonnance.

Article 12 covers restrictive practices.

Article 13 covers Abuse of Dominant Position

Article 14 covers the Control of Anti-Competitive Practices

12.3 Décret n° 2000-371/PRN/MC du 12 octobre 2000 portant modalités d'établissement et de contrôle des tarifs des services de Télécommunications

A more general decree addressing tariff setting.

12.4 Décret n° 2000-399 / PRN/MC du 20 octobre 2000 portant conditions générales de l'interconnexion

Article premier: Définitions

Opérateur dominant opérateur de réseau de télécommunication ouvert au public dont la part de marché (pourcentages des recettes de cet opérateur par rapport aux recettes de tous les opérateurs) sur un service ou un ensemble de services compatibles est au mons égale à 30%.

Point d'interconnexion lieu où un opérateur de réseau établit les équipements d'interface permettant l'interconnexion avec les opérateurs des autres réseaux.

Article 3: Caractère obligatoire de l'interconnexion

Les opérateurs de réseaux de télécommunications ouverts au public sont tenus d'interconnecter leurs réseaux avec ceux des opérateurs de réseaux supportant des services compatibles. A cet effet, tout opérateur recevant une licence pour l'établissement d'un réseau ou service ouvert au public est tenu de s'interconnecter avec au moins un autre opérateur fournisseur un service compatible, s'il existe, pourvu que le réseau de cet opérateur soit interconnecté à celui des autres opérateurs de services compatibles.

Seuls les Opérateurs dominants ont l'obligation de répondre favorablement aux demandes d'interconnexion des autres opérateurs de services compatibles.

Jusqu'au 31 décembre 2004, tous les opérateurs de services téléphoniques ou compatibles seront tenus de s'interconnecter au réseau téléphonique de SONITEL et la SONITEL sera tenue de faire droit à leurs demandes d'interconnexion dans les conditions définies par le présent décret.

Article 4: Demandes d'interconnexion

L'opérateur désirant établir une interconnexion en fait la demande par écrit à l'opérateur offrant l'interconnexion. Celui-ci répond dans un délai ne dépassant pas trente (30) jours calendaires en proposant les modalités techniques et financières de l'interconnexion, dans le respect de la réglementation en vigueur.

Les demandes d'interconnexion ne peuvent être refusées si elles sont raisonnables au regard des besoins du demandeur et des capacités de l'exploitant du réseau à la satisfaire. Tout refus d'interconnexion doit être motivé par l'opérateur refusant l'interconnexion.

Dans toutes les hypothèses de refus d'interconnexion, le demandeur peut porter réclamation devant l'autorité de régulation. En cas de refus d'interconnexion non fondé, l'autorité de régulation rend une décision motivée dans un délai de trente jours à compter de sa saisine par le demandeur d'interconnexion, après avoir sommé le défendeur de présenter ses observations.

Le recours de la décision de l'autorité de régulation n'est pas suspensif.

Article 6: Location de capacité

Les conditions techniques et tarifaires de cette offre de location de capacité figurent dans leur catalogue d'interconnexion.

Article 9: Normes et spécifications techniques

L'autorité de régulation détermine et publie les normes et spécifications techniques auxquelles les opérateurs doivent se conformer:

- en vue d'assurer le respect des exigences essentielles;
- en vue de permettre l'interface des différents réseaux.

L'autorité choisit toujours, lorsqu'elles existent, des normes et spécifications communes avec les pays voisins du Niger, afin de faciliter l'intégration des réseaux au plan régional. (Authors' underlining)

A défaut de décision de l'autorité de régulation à la date où l'interconnexion sera négociée entre deux opérateurs, les parties pourront librement déterminer les spécifications des interfaces entre leurs réseaux, sous réserve de l'adoption de normes recommandées par l'Union Internationale des Télécommunications.

TITRE III: CATALOGUE D'INTERCONNEXION

Article 12: Contenu du catalogue

1. Services fournis

Service d'acheminement du trafic téléphonique commuté y compris les données transitant sur le réseau téléphonique commuté offrant des accès techniques et des options tarifaires permettant de décomposer l'offre entre services:

- local,
- interurbain,
- international.

2. Conditions techniques

Description de l'ensemble des points d'interconnexion et des conditions d'accès physique à ces points

Description complète des interfaces d'interconnexion proposées au catalogue d'interconnexion et notamment le protocole de signalisation utilisé à ces interfaces et ses conditions de mise en œuvre.

3. Tarifs et frais

Tarifs pour l'établissement et l'utilisation de l'interconnexion, y compris les tarifs de mise à disposition d'emplacements et de sources d'énergie pour les équipements localisés sur l'emprise du fournisseur d'interconnexion.

Modalités de détermination des frais variables associés à l'établissement de l'interconnexion (adaptation spécifiques par exemple).

Article 17: Evaluation des coûts d'interconnexion

Les tarifs d'interconnexion et de location de capacité sont établis dans le respect du principe d'orientation vers les coûts.

A cet effet, les opérateurs mettront en place avant la fin de la période transitoire de cinq (5) ans visée à l'article 19 ci dessous une comptabilité analytique qui leur permettra d'identifier les différents types de coûts suivants:

- Les coûts de réseau général, c'est à dire les coûts relatifs aux éléments de réseaux utilisés à la fois par l'opérateur pour les services à ses propres utilisateurs et pour les services d'interconnexion ou de location de capacité;
- Les coûts spécifiques aux services d'interconnexion, c'est à dire les coûts directement induits par les seuls services d'interconnexion ou de location de capacité;
- Les coûts spécifiques aux services de l'opérateur autre que l'interconnexion, c'est à dire les coûts induits par ces seuls services.

Les coûts spécifiques aux services d'interconnexion sont entièrement alloués aux services d'interconnexion.

Les coûts spécifiques aux services de l'opérateur autres que l'interconnexion sont exclus de l'assiette des coûts de service d'interconnexion. Sont particulièrement exclus les coûts de l'accès (boucle locale) et les coûts commerciaux. Publicités, marketing, vente, administration des ventes hors interconnexion, facturation et recouvrement hors interconnexion.

Par ailleurs, les coûts alloués à l'interconnexion doivent reposer sur les principes suivants:

1. les coûts pris en compte doivent être pertinents, c'est à dire liés par une forme de causalité directe ou indirecte au service rendu d'interconnexion,

2. les coûts pris en compte doivent tendre à accroître l'efficacité économique à long terme, c'est à dire que les coûts considérés doivent prendre en compte les investissements de renouvellement de réseau fondés sur la base des meilleurs technologies disponibles et tendant à un dimensionnement optimal du réseau, dans l'hypothèse d'un maintien de la qualité du service.

L'évaluation des coûts d'interconnexion est réalisée annuellement par les opérateurs sur la base des comptes de l'exercice précédent. Elle est communiquée à l'autorité de régulation en appui du catalogue d'interconnexion.

L'autorité de régulation définit autant que de besoin les règles comptables et de modélisation détaillées applicables par les opérateurs, dans le but d'assurer la cohérence des méthodes et la validité économique des résultats. A cette fin, les opérateurs sont associés à l'élaboration de ces règles.

TITRE VII: SANCTIONS ET COMPENSATIONS

Article 24: Pénalités

L'autorité de régulation applique aux opérateurs fautifs les pénalités prévues par l'ordonnance n°99-045 du 26 octobre 1999 portant réglementation des télécommunications et par ses textes réglementaires d'application.

12.5 Cahier des charges de la licence d'opérateur de téléphonie fixe du 3 décembre 2001

Specifically covers incumbent Sonitel

8.3. Le Titulaire peut fournir à toute personne qui en formule la demande les services d'installation et d'entretien d'un équipement terminal de base, connecté ou à connecter aux réseaux ouverts au public, dans les, conditions visées du présent Cahier des charges. Toutefois le Titulaire n'est pas soumis à une obligation d'entretien si l'équipement terminal n'a pas été installé par ses soins.

9.1. Dans le respect des dispositions de la Loi susvisée et de ses textes d'application, le Titulaire est autorisé à construire son propre réseau de transmission. Il peut également louer auprès de tiers des liaisons ou des infrastructures pour assurer un lien direct entre ses équipements.

10.1. Le Titulaire est autorisé à exploiter ses propres infrastructures internationales sur le territoire nigérien, aux fins d'acheminer les communications internationales de ses abonnés au départ de la République du Niger ou destinés à ces derniers en République du Niger.

10.2. Le Titulaire négocie librement avec les exploitants étrangers agréés par les autorités de leur pays, les principes et modalités de rémunération des liaisons et équipements utilisés en commun, conformément aux règles et recommandations des organismes internationaux auxquels adhère la République du Niger.

12.3. Le Titulaire est tenu de mettre en place des services d'interconnexion respectant les caractéristiques minimales figurant en Annexe 7 du présent Cahier des charges. En application de l'article 38 de la loi susvisée, le Titulaire élaborera et publiera un catalogue d'interconnexion.

Le catalogue d'interconnexion détermine les conditions techniques et tarifaires des offres du Titulaire. A ce titre, le catalogue d'interconnexion inclut au minimum les prestations et éléments suivants:

- services d'acheminement du trafic commuté;
- services et fonctionnalités complémentaires et avancées;
- modalités de mise en œuvre de la portabilité des numéros et de la sélection du transporteur dès que techniquement possible;
- description de l'ensemble des points physiques d'interconnexion et des conditions d'accès à ces points;
- conditions techniques et tarifaires des liaisons de raccordement aux points d'interconnexion de l'opérateur tiers;
- description complète des interfaces d'interconnexions, et notamment le protocole de signalisation utilisé à ces interfaces, et ses conditions de mise en œuvre; services d'aboutement de liaisons louées.

12.4/ Le Titulaire ne peut invoquer l'existence d'une offre inscrite au catalogue pour refuser d'engager des négociations commerciales avec un autre opérateur en vue de la détermination des conditions d'interconnexion qui n'auraient pas été prévues par son catalogue.

12.5/ En cas de désaccord entre le Titulaire et un autre opérateur, il sera fait recours à l'arbitrage de l'Autorité de Régulation, dans les conditions prévues par l'Ordonnance n°99-045. L'Autorité de Régulation statuera, dans les deux mois de sa saisine, sur la base des tarifs, habituellement pratiqués dans les pays de la sous région sub-saharienne dont le secteur des télécommunications cellulaires est ouvert à la concurrence.

12.6 Loi n° 2005-31 du 1er décembre 2005 modifiant l'Ordonnance n° 99-044 du 26 octobre 1999 portant création, organisation et fonctionnement d'une Authorité de Régulation multisectorielle

This covers changes to the multi-sectoral regulator.

12.7 Cahier des charges des licences d'opérateur de téléphonie mobile

La date d'entrée en vigueur de la Licence est fixée à la date de signature du décret du Chef de l'Etat autorisant l'entrée du Partenaire Stratégique au capital de la SONITEL. (Authors' emphasis)

8.3 Accès direct à l'international

8.3.1 Le Titulaire n'est autorisé à exploiter ses propres infrastructures internationales sur le territoire nigérien, dédiées à son activité au titre de présent Cahier des Charges aux fins d'acheminer les communications internationales de ses abonnés GSM, y compris les usagers visiteurs et les usagers itinérants, au départ du Niger ou destinés à ces derniers au Niger, qu'à compter du 1er Janvier 2005.

8.3.2 Le Titulaire négocie librement avec les exploitants étrangers agréés par les autorités de leur pays, les principes et modalité de rémunération des liaisons et équipement utilisés en commun, conformément aux règles et recommandations des organismes internationaux auxquels adhère le Niger.

8.5 Interconnexion

En application de l'article 38 de l'Ordonnance n°99-045 précitée, le Titulaire bénéficie du droit d'interconnecter son réseau des opérateurs. Les opérateurs offrant les services d'interconnexion donnent droit aux demandes formulées par le Titulaire.

Les conditions techniques, financières et administratives sont fixées dans des contrats librement négociés entre les opérateurs dans le respect de leur cahier des charges respectif.

Le cahier des charges de la SONITEL, opérateur disposant de l'exclusivité du service fixe et de l'accès international jusqu'au 31 décembre 2004, lui impose d'offrir un service d'interconnexion dans les conditions figurant en Annexe 4 du présent Cahier des Charges.

Actuellement, la totalité des liaisons de transmission nationales de la SONITEL sont analogiques et de qualité et capacité insuffisantes pour permettre la fourniture d'un service de location de capacités adapté aux besoins des autres opérateurs. Le cahier des charges de la SONITEL prévoit la mise en place de liaisons numériques d'ici la fin 2004 pour la desserte des chefs-lieux d'arrondissement. La SONITEL aura l'obligation de satisfaire les demandes de location de capacité sur les liaisons numériques desservant ces localités après leur mise en place.

En cas de désaccord entre le Titulaire et la SONITEL sur les tarifs d'interconnexion, il sera fait recours à l'arbitrage de l'Autorité de Régulation, dans les conditions prévues par l'Ordonnance n°99-045.

8.7 Utilisation des domaines public/privé de l'Etat pour l'installation des équipements

8.7.1 Établissement des équipements

Le Titulaire a le droit de réaliser les travaux nécessaires à l'exploitation et à l'extension de son réseau. IL s'engage à respecter des dispositions législatives et réglementaires en vigueur notamment en matière d'aménagement du territoire et de protection de l'environnement à l'occasion de la réalisation d'équipements ou d'ouvrages particuliers.

10.3 Publicité des tarifs

Le Titulaire est tenu de publier les tarifs de fourniture de chaque catégorie de service de connexion, de maintien, d'adaptation ou de réparation de tout équipement terminal connecté à son réseau.

ANNEXE 4

OBLIGATIONS DE LA SONITEL AU TITRE DE L'INTERCONNEXION

1. Dispositions générales

En application de l'article 39 de l'Ordonnance N°99-045 portant réglementation des télécommunications, la SONITEL élaborera et publiera un catalogue d'interconnexion.

Le catalogue d'interconnexion détermine les conditions techniques et tarifaires des offres du titulaire. A ce titre, le catalogue d'interconnexion inclut au minimum les prestations et éléments suivants:

- Services d'acheminement du trafic commuté;
- Services et fonctionnalités complémentaires et avancées;
- Modalités de mise en œuvre de la portabilité des numéros et de la sélection du transporteur;
- Description de l'ensemble des points physiques d'interconnexion et des conditions d'accès à ces points;
- Conditions techniques et tarifaires des liaisons de raccordement aux points d'interconnexion de l'opérateur tiers;
- Description complète des interfaces d'interconnexions, et notamment le protocole de signalisation utilisé à ces interfaces, et ses conditions de mise en œuvre;
- Services d'aboutement de liaisons louées.

La SONITEL ne peut invoquer l'existence d'une offre inscrite au catalogue pour refuser d'engager des négociations commerciales avec un autre opérateur en vue de la détermination des conditions d'interconnexion qui n'auraient pas été prévues par son catalogue.

12.8 Exposé des Motifs de l'Ordonnance

Document about the setting up of the multi-sectoral regulator ARM.

12.9 Décision n° 0063 du 29 octobre 2009 portant mise en demeure de Orange Niger S.A de se conformer à l'Ordonnance n° 99-045 du 26 octobre 1999 portant reglementation des téécommunciations ainsi qu'au Décret n° 2000-39/PRN/MC du 20 octobre 2000 portant conditions générales de l'interconnexion

This provides a cross-referencing paragraph to the overall legislation. The same is true for the Zain licensing document examined.

12.10 Ordonnance N°……/PCSRD portant création, attributions, organisation et fonctionnement d'une Autorité de Régulation des secteurs de la Poste et des Télécommunications du 18 février 2010

Again covering the operation of the multi-sectoral regulator.

13. Nigeria

13.1 Nigerian Communications Act , 2003

This the Act establishing the Nigerian Communications Commission and lays out its powers and responsibilities.

13.2 Determination on Dominance in Selected Communications Markets in Nigeria, March 26, 2010

The Consultation was conducted pursuant to the Nigerian Communications Act 2003 (the "Communications Act"). It is the Commission's responsibility under the Act to determine whether telecommunications licensees hold a position of market dominance, and, if so whether they are abusing that position by acting in a manner that substantially lessens competition. The Commission has determined that no licensee currently holds a position of market dominance in the Mobile Telephone Services market, including the licensees with leading market shares, MTN, Celtel (Zain) and Glo mobile (Globacom). The Commission has also determined that no group of two or more licensees currently holds a position of joint or collective dominance in that market. The Commission has not found any conclusive evidence that any of the mobile licensees are engaging in conduct which has the purpose or effect of substantially lessening competition.

The International Internet Connectivity market has, in the past, been dominated by NITEL, as the only supplier of international submarine telecommunications cable services to Nigeria. However, no fewer than 4 new submarine cables are scheduled to commence service in Nigeria, two within the coming months and two more within the next two years. These new cables will have many times the capacity and will utilize newer technology than the SAT-3 cable used by NITEL. The Commission has not found conclusive evidence that NITEL is engaging in conduct which has the purpose or effect of substantially lessening competition. In fact, the available evidence indicates that the International Internet Connectivity market is becoming highly competitive, with new operators actively pursuing customers. The evidence also indicates that the market will become increasingly competitive on a prospective basis. Accordingly the Commission has determined that NITEL is not in a dominant position in the International Internet Connectivity market.

During this Consultation, a number of concerns were expressed by some licensees about allegedly anti-competitive or abusive behaviour on the part of some licensees with larger market shares. In this Determination, the Commission notes that its telecommunications regulatory framework provides specific remedies to deal with substantiated cases of anti-competitive conduct. In most cases, these remedies can be implemented without a finding of dominance.

13.3 Guidelines on Collocation and Infrastructure Sharing Issued by the Nigerian Communications Commission

Guidelines on Collocation and Infrastructure Sharing Issued by the Nigerian Communications Commission

1. Background

(1) The Commission has responsibility under the Act to

(a) Promote fair competition in the communications industry, and encourage and promote infrastructure sharing among its licensees.

(b) Develop guidelines for Collocation and Infrastructure Sharing

("C/IS").

3. Objectives of the Guidelines

(1) The Primary object of these Guidelines is to establish a framework within which operators can negotiate C/IF arrangements, and for that purpose, specifically to-

(a) Ensure that the incidence of unnecessary duplication of infrastructure is minimized or completely avoided;

(b) Protect the environment by reducing the proliferation of infrastructure and facilities installations;

(c) Promote fair competition through equal access being granted to the installations and facilities of operators on mutually agreed terms;

(d) Ensure that the economic advantages derivable from the sharing of facilities are harnessed for the overall benefit of all telecommunications stakeholders;

(e) Minimize capital expenditure on supporting infrastructures and to free more funds for investment in core network equipment.

(f) Encourage operators to pursue a cost-oriented policy with the added effect of a reduction in the tariffs chargeable to consumers.

4. Types of Infrastructure Amenable to Sharing

(1) Infrastructures amenable to sharing are those that can be shared without an attendant risk of lessening of competition.

(2) The Commission shall encourage and promote the sharing of the following infrastructures:

(a) Rights of way.

(b) Masts.

(c) Poles.

(d) Antenna mast and tower structures.

(e) Ducts.

(f) Trenches.

(g) Space in buildings.

(h) Electric power (public or private source).

(3) Where the sharing of an infrastructure such as Rights of Way and Electric power is precedent upon securing the necessary approval of a granting authority, such approval should be obtained before the sharing arrangement can be finalized.

(4) The Commission may from time to time either on its own initiative or upon the request of any interested person add to the list of infrastructure that can be shared.

5. Types of Infrastructure Not Amenable to Sharing

(1) The Commission will not encourage and promote sharing of the following infrastructures:

(a) Complete network structures.

(b) Switching centers.

(c) Radio network controllers.

(d) Base stations.

6. Procedure for Negotiating C/IS

….

(2) All negotiations for infrastructure sharing must be done with the utmost good faith. The owner of a facility must not;

(a) Obstruct or delay negotiations or resolution of disputes;

(b) Refuse to provide information relevant to an agreement including information necessary to identify the facility needed and cost data;

(c) Refuse to designate a representative to make binding commitments.

Part III: Collocation

8. Collocation as an Element of Interconnection

(1) Collocation is an element of the interconnection of networks hence it is essential that operators agree on terms of its implementation towards ensuring seamless interconnectivity. Collocation shall constitute part of the negotiations for interconnection and be governed by provisions of the Telecommunications Network Interconnection Regulations.

(2) Every major operator, especially dominant operators as may be determined by the Commission should include in their Reference Interconnection Offer (RIO) an offer for the facilities available for collocation, including a price list for the different components of collocation.

……

(4) Where a request is made for physical collocation but such collocation is not deemed feasible, virtual collocation should be offered by the interconnection providing operator.

(5) Where virtual collocation is not feasible, remote collocation should be offered in its stead.

(6) A request for remote collocation shall not be rejected on any grounds.

(7) Specifically, remote collocation shall not be refused on grounds of insufficient capacity, safety considerations, reliability or other general engineering considerations.

9. Reference Offer and Standard Practice List

…

(2) Every operator shall ensure that its reference offer is readily available to other operators with a view to promoting fairness in the negotiation process.

15. Standardization

…….

(2) The standard procedures to be developed by parties under the arrangement will be in the areas of:

(a) Maintenance

(b) Fault clearance

(c) Access at the facility

(d) Emergency

(e) Cleaning

(f) Safety

(g) Security

SCHEDULE

CONTENTS OF REFERENCE OFFER – ISSUES RELEVANT TO THE OPERATOR REQUESTING COLLOCATION FOR NEGOTIATION PURPOSES

(a) General Sharing Issues
  (i) Access and refusal
  (ii) Separation
  (iii) Standardization
  (iv) Re-development/Re-location
  (v) Study and preparatory work
  (vi) Requirements of requesting operator
  (vii) Commencement/duration/renewal
  (viii) Liability
  (ix) Insurance
  (x) Confidentiality
  (xi) Security
  (xii) Arbitration
  (xiii) Modification/Termination
(b) Provisioning
  (i) Time schedules
  (ii) Information requirements
  (iii) Constructional specifications
  (iv) Technical Specifications
  (v) Delivery of Access
  (vi) Testing
(c) Operation
  (i) Requirements on equipment
  (ii) Installation of equipment
  (iii) Maintenance
  (iv) Fault clearance
  (v) Access conditions of persons
(d) Pricing
  (i) Standard prices
  (ii) Price components
  (iii) Pricing of special requirements
  (iv) Sharing of common facilities
  (v) Penalties
(e) Technical
  (i) Spurious emissions
  (ii) Harmonics
  (iii) Electromagnetic compatibility
  (iv) Interference

(v) Heat Dissipation and thermal considerations

(vi) Wind loading

13.4 Infrastructure Sharing & Collocation Services Licence

Under Section 32 of the Nigerian Communications Act, 2003

Licence detailing as in the title.

13.5 International Data Access Gateway Licence, Nigerian Communications Commission

10 year licence

Approval of Tariffs Terms and Conditions

2.1 The Licensee shall lodge with the Commission, a request for approval of any new tariff plan, of changes to an existing tariff plan or of changes within an existing tariff plan (a ”request”), which sets out in relation to each kind of service that the Licensee proposes to offer or is offering:

….

(c) the method adopted for determining the proposed tariff or charges.

Prohibition of Undue Preference and Undue Discrimination

3.1 The Licensee shall not (whether in respect of charges, application of discount schemes, or other terms or conditions applied or otherwise) show undue preference to or exercise undue discrimination against any particular person or persons of any class or description in respect of:

(a) the provision of a service under this Licence; or

(b) the connection of any equipment approved by the Commission.

3.2 The Licensee shall be deemed to have shown such undue preference or to have exercised such discrimination if it unfairly favours to a material extent a business carried on by it or by its lawful telecommunications associates in relation to any of the matters mentioned in Condition 4.1 so as to place at a significant competitive disadvantage persons competing with that business.

3.3 Any question relating to whether any act done or course of conduct pursued by the Licensee amounts to such undue preference or such undue discrimination shall be determined by the Commission, but nothing done in any manner by the Licensee shall be regarded as undue preference or undue discrimination if and to the extent that the Licensee is required to do that thing in that manner by or under any provision of this Licence.

Prohibition of Cross-Subsidies

4.1 The Licensee shall ensure that his business under this Licence is not unfairly cross-subsidised from any other source, except in cases where the Licensee is under an obligation to provide service at a place in an area in which the demand or the prospective demand for the service is not sufficient, having regard to the revenue likely to be earned from the provision of the service in the area, to meet all the costs reasonably to be incurred by the Licensee in providing the service there, including;

i. the cost of equipment necessary for the provision of the service there;

ii. the cost of installing, maintaining and operating such equipment for the purpose of providing service there, and

iii. the cost of the trained manpower necessary to provide the service there;in which case prior approval shall be obtained from the Commission.

Prohibition of Anti-competitive Conduct

5.1 The Licensee shall not make it a condition of:

(a) Providing any telecommunication service;

(b) Supplying any telecommunication equipment; that any person should acquire from the Licensee or from any other person specified or described by the Licensee:

i. any telecommunication service other than the telecommunication service requested save where that service cannot be provided without the provision of that other telecommunication service; or

ii. any telecommunication equipment (including in particular but not limited to terminal equipment) not incorporated in the Systems supplied save where the telecommunication service requested cannot otherwise be provided or the telecommunication equipment cannot otherwise be used.

Separate Accounts for all Activities

8.1 The Licensee shall maintain accounting records in such a form that all business activities it undertakes are separately identifiable or separately attributable in the books of the Licensee, being records sufficient to show and explain the transactions in each of those activities.

Requirement to Furnish Information to the Commission

15.1 The Licensee shall permit the Commission to inspect and if required to make copies of records, documents and accounts relating to the Licensee's business for the purpose of enabling the Commission to perform its functions assigned to it under the Act.

15.2 In making any such request the Commission shall ensure that no undue burden is imposed on the Licensee in procuring and furnishing such information and, in particular, that the Licensee is not required to procure or furnish a report which would not normally be available to it unless the Commission considers the particular report essential to enable it exercise its function.

Interconnection with other Networks

28.1 The Licensee shall have the right to interconnect with the PSTN Network and other IDA or similar networks.

28.2 The Licensee shall have the right to demand interconnection and be connected to all other network operators or Interconnect Exchange service providers licensed by the Commission.

28.3 The Licensee shall abide by all relevant provisions of the Telecommunications Networks Interconnection Regulations, or any subsequent amendment thereto, as may be published by the Commission.

28.4 The Licensee shall not deny any licensed operator interconnection to its gateway. Where however the Licensee intends to refuse an operator access to its gateway, it shall notify the Commission of the reasons for such intended refusal and it shall be the responsibility of the Commission to determine whether or not such reasons are justifiable.

13.6 International Gateway Licence (IGL/XXX/07), Nigerian Communications Commission

Much the same ground covered as the previous licence but in addition:

Resellers and Agents

5.1 The Licensee's rights under this Licence may be exercised partially through Agents and Resellers, it being understood that the Licensee shall have the discretion to determine and implement the appropriate means of marketing and distribution of its services inclusive of the appointment and termination thereof of its Resellers and Agents.

Prohibition of Anti-Competitive Conduct

9.1 The Licensees shall not engage in any conduct which in the opinion of the Commission has the purpose or effect of preventing or substantially limiting, restricting or distorting competition in the operation of the service or in any market for the provision or acquisition of telecommunication installation, service or equipment.

Interconnection Arrangements with other Operators including Access provisioning, Co-location and Facility Sharing

21.1 If the Licensee receives a request for interconnection from another Operator, then the Licensee shall have an obligation to interconnect its telecommunication system with the other Operator's network in accordance with the principles of neutrality, non-discrimination and equality of access pursuant to terms and conditions negotiated in good faith between them. Technical and commercial arrangements for interconnection are a matter for agreement between the parties involved, subject to the provisions of this Condition.

21.2 The Licensee shall be excused from any obligation to negotiate or enter into an interconnection agreement with a requesting Operator if, as determined by the Commission in its reasonable discretion:

(a) Such an agreement is prohibited by law; or

(b) The Licence issued to the other Operator does not authorise the services for which interconnection is requested; or

(c) The requested interconnection is rendered impossible as a result of technical limitations; or

(d) Such interconnection would endanger life or safety or result in injury or harm to Licensee's property or hinder the quality of the services provided by Licensee.

21.3 All interconnection agreements between the Licensee and any other Operator shall be in writing and shall comply with:

(a) The Act, the Regulations and/or the Interconnection Guidelines laid down by the Commission; and

(b) The principles of neutrality, transparency, non-discrimination, fair competition, universal coverage, access to information, equality of access and equal terms and conditions.

21.4 The Licensee shall register with the Commission all Interconnection Agreements entered into pursuant to Condition 21.1, not later than 30 (thirty) days from the date of execution of the Agreement. The Licensee shall furnish to the Commission any additional information that the Commission may require in respect of such Interconnection Agreement and on evaluating the terms and conditions and the charges set out in the proposed Interconnection Agreement, the Commission may require the Licensee and the interconnecting party to revise the Agreement if interconnection as contemplated therein is inconsistent with the Act, the Regulations and/or the Interconnection Guidelines laid down by the Commission or the integrity of the public network.

21.5 The Licensee may at any time request the Commission to make a direction in order:

(a) To specify issues which must be covered in an interconnection agreement;

(b) To lay down specific conditions to be observed by one or more parties to the agreements; or

(c) As the case may be, to set time limits within which negotiations are to be completed.

21.6 The Licensee shall prepare and present a Reference Interconnection Offer to the Commission for approval prior to publication. Upon receipt of the Commission's prior approval, the Licensee shall publish the Reference Interconnection Offer by:

(a) Sending a copy thereof to the Commission; and

(b) Placing as soon as practicable thereafter, a copy thereof in a publicly accessible part of every Major Office of the Licensee in such a manner and in such a place that it is readily available for inspection free of charge by members of the public during working hours; and

(c) Sending a copy thereof at reasonable cost to any person who may request such a copy.

21.7 The Licensee's Reference Interconnection Offer shall include a description of interconnection services to be supplied in segmented components according to market needs and the associated terms and conditions, including charges. Where justified, the Commission reserves the right to impose changes in the Reference Interconnection Offer.

21.8 The Licensee shall comply with the requirements of any directions given to the Licensee by the Commission under the provisions of this Condition and under the provisions of the Regulations and/or Interconnection Guidelines laid down by the Commission.

21.9 Where:

(a) An Operator establishes a prima facie case that the Licensee is not performing an obligation which it is required to perform under an Interconnection Agreement; and

(b) The Commission considers that:

(i) The obligation on interconnection ought to be performed; and

(ii) The Operator is not able satisfactorily to enforce the agreement so that the obligation is performed within such time as the Commission considers necessary; the Commission may require the Licensee to perform the obligation subject to such conditions as are reasonable in the circumstances having regard, in particular, to the terms and conditions which apply and to anything which the Operator may reasonably be expected to do in order to mitigate the effects of the Licensee's failure to perform its obligation.

21.10 Before making a requirement under Condition 21.9, the Commission shall notify the Licensee of the prima facie case established by the Operator, its conclusions thereon and the direction of the Commission on the matter. The Licensee shall be afforded reasonable time within which to make representations.

21.11 Where the Licensee has the right under the national legislation to install facilities on, over or within public or private land, or may take advantage of a procedure for the expropriation or use of property, the Commission shall encourage the sharing of such facilities or property or both with other Operators, in particular where essential requirements deprive other Operators of access to viable alternatives. The agreements for collocation or facility sharing are a matter for commercial and technical negotiations between the parties concerned. The Commission may intervene to resolve disputes concerning collocation or facility sharing at the request of either party.

21.12 Where there is a dispute concerning interconnection between the Licensee and other Operators, the Commission shall, at the request of either party, take steps to resolve the dispute within 6 (six) months of the date of the request and shall invite both parties for consultation before taking a decision on the matter. Such decision shall be final and conclusive and shall represent what is in the opinion of the

Commission a fair balance between the legitimate interests of both parties. The Directions made pursuant to the decision shall be notified to the parties and published. The parties shall be given a full statement of the reasons on which it is based.

Equal Access

25.l This Condition applies in respect of any Long Distance Operator with whom the Licensee has entered into an interconnection agreement for which the Commission has made a direction.

25.2 (a) The Commission may, subject to the provisions of Condition 25.4, make a direction following the request of an Operator, that the Licensee shall make equal access available in respect of that Operator.

(b) The direction shall contain a functional specification of exchange software for the provision of equal access. The specification shall be submitted to the Commission by the Licensee (following a request from the Commission) or, if the Commission, having carried out such consultation as appears to it appropriate, considers that specification to be unsatisfactory, in a form determined by the Commission. Before making such a determination, the Commission shall notify the Licensee as to why the Licensee's specification is unsatisfactory and give the Licensee the opportunity to make representations thereon.

25.3 The Commission shall not make a direction under Condition 25.2 unless:

(a) It has carried out a cost-benefit analysis comparing the likely benefits to telecommunication customers to be gained from the introduction of equal access with all costs likely to be incurred, including opportunity costs, which analysis indicates that the gains outweigh the likely costs; and

(b) In its opinion sufficient arrangements in relation to the pricing of telecommunication services provided by the Licensee have been made in order to achieve fair competition.

25.4 When carrying out the cost-benefit analysis referred to in Condition 25.3(a), the Commission shall consult the Licensee and such other persons as appear to be appropriate, affording them a reasonable period, being not less than 28 days, in which to make representations, and it shall take their representations into account when reaching its conclusions. On conclusion of the analysis it shall make it available to the Licensee and such other persons.

25.5 (a) In this Condition" equal access" means a facility provided to an Operator whereby it can arrange with a customer of the Licensee that, following a request by that customer to the Licensee, the customer may choose over which public telecommunication system, being a system run by a Long Distance Operator, to route National and International calls made by means of an exchange line provided to him by the Licensee. The choice shall be exercisable in either of the following ways, at the option of the customer:

(i) By pre-selection, that is to say, that the customer may, by registering a preference with the Licensee, name a particular such Operator for the conveyance of all such calls. The Licensee may offer to provide a facility to override the preference in the case of any particular call; or

(ii) On a call-by-call basis, that is to say that the customer must, for each call, exercise his choice by dialling a short initial code designated for the particular such Operator (or the Licensee) chosen by the customer for the call in question. The respective initial codes for the Licensee and the Operators shall be of equal length.

(b) The Licensee shall not require the customer to acquire any special equipment or to pay any fee as a prerequisite to his being able to obtain the equal access facility. For the avoidance of doubt, the Licensee may impose a charge if a customer who has registered a preference changes that preference in any way.

25.6 Where a Long Distance Operator requires the Licensee to provide equal access and specifies exchanges forming part of the Licensee's Systems at which it is to be provided and the Licensee has not, after a reasonable period as may be determined by the Commission but not exceeding 90 (ninety) days from the date of the formal requirement by the Long Distance Operator, entered into an agreement with that Operator for the provision of equal access, the Commission may, on the application of either the Licensee or the Operator, determine the terms and conditions of the agreement, being terms and conditions necessary for the provision of equal access, or such terms and conditions which the Licensee and the Operator have failed to agree.

25.7 Before making a determination under Condition 25.6, the Commission shall notify the Licensee and the Operator in respect of which terms and conditions it proposes to make the determination and why and shall afford the Licensee and that Operator adequate time, being not less than 28 days, in which to make representations thereon.

25.8 (a) Where the Commission makes a determination under Condition 25.6, it shall secure that any development of the Licensee's Systems made necessary thereby is consistent with the Licensee's then planned programme of network modernisation and development and in particular that the Licensee is not required to introduce equal access at any exchange if to do so would involve either:

(i) Modernising the exchange in a case where but for the proposed introduction of equal access, the exchange would not have been modernised at that time; or

(ii) A significant risk of impairment to the quality of telecommunication services provided by means of the Licensee's Systems.

(b) Subject to Condition 25.8(a), where the Commission makes a determination under Condition 25.6, the following shall apply in relation to the preparation of exchanges for equal access:

(i) The determination may require the Licensee to introduce equal access within a reasonable period. At a digital exchange to which the determination relates which does not require conversion for the introduction of equal access, a reasonable period for adapting the exchange to provide equal access shall be 6 (six) months. In relation to such an exchange which requires conversion, or any other exchange of an exchange type which is capable of conversion to provide equal access, a reasonable period for conversion and adaptation shall, subject to Condition 25.8(a), be 18 (eighteen) months. Different periods may be specified for different exchanges;

(ii) Where at the date of the determination an exchange to which it relates is not digital, and is of an exchange type which is not capable of conversion to provide equal access, the Licensee shall ensure, subject to Condition 25.8(a), that, when modernisation is planned, the specification therefor, provides for equal access.

25.9 (a) Any determination under Condition 25.6 shall secure that the Licensee's under-mentioned costs of introducing equal access are apportioned according to the provisions of Condition 25.9 (b):

(i) Costs incurred by the Licensee which are not related to any particular locality consisting of initial development and set-up costs including without limitation, the costs of hardware design and production, the costs of software development and the costs of planning and training;

(ii) Costs incurred by the Licensee in relation to a particular locality where an Operator has requested the introduction of equal access, consisting of initial development and set-up costs in relation to that locality including, without limitation, the costs of installation of hardware and software and the costs of distribution of necessary documentation and instructions and of training;

(iii) The incremental costs of providing at any particular locality equal access to any further Operator after the first Operator at that locality;

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(iv) The costs per customer of registering preferences and of implementing arrangements for the initial code referred to in Condition 25.5 (a) (ii); and

(v) The costs per customer of changing registered preferences or removing, in relation to any particular exchange line, arrangements for the initial code.

(b) Subject to Conditions 25.9 (c) and (d):

(i) The costs referred to in Condition 25.9(a)(i) shall be apportioned between the Licensee and Operators who make requirements under Condition 25.6. The costs shall initially be apportioned between the Licensee and the first such Operator. Procedures will be established for subsequent Operators to make a proportionate contribution to the costs in such manner as the Commission shall determine from time to time;

(ii) The costs referred to in Condition 25.9(a)(ii) shall be apportioned between the Licensee and Operators who make requirements under Condition 25.6 in relation to the particular locality. The apportionment rules set out in Condition 25.9(b) (i) shall apply here;

(iii) Where the addition of an Operator at a locality reduces the contribution to the costs of equal access at that locality of the Licensee and the other Operators, the procedures in Condition 25.9(b)(i) shall apply to the costs referred to in Condition 25.9(a)(iii). In any other case, that Operator shall pay such costs;

(iv) The costs referred to in Condition 25.9(a) (iv) and (v) above shall be met by the Long Distance Operator, whether the Licensee or an Operator, to whom the customer chooses to route calls by registering a preference or, where the customer exercises choice on a call-by-call basis, apportioned equitably among the Long Distance Operators (including, where appropriate, the Licensee) to whom the customer has the option of routing calls from time to time.

(c) The apportionment of the costs referred to in Condition 25.9(a) (i), (ii) and (iii) shall reflect equitably the benefit to the Operator and its customers, actual and potential, of the implementation of equal access in relation to that Operator.

(d) Before determining the apportionment of any costs referred to in Condition 25.9(a), the Commission shall inform the Licensee and the Operator of its proposed determination, together with a full explanation of how it is calculated, and shall allow the Licensee and the Operator a reasonable period, being not less than 28 (twenty eight) days, in which to make representations.

13.7 Metro Fibre Network Licence, Undated

DEFINITIONS AND INTERPRETATIONS

1. In these Conditions unless the context otherwise requires, the expressions shall have the following meanings:

“Interconnection” The connection of the Licensee’s network with a private network or the network of an Access Provider in order to convey messages to an from their respective networks.

“Interconnection Fees” Fees payable in terms of an Interconnection Agreement for the carriage of messages originating in one network and terminating in another network.

“Interconnection The Interconnection Guidelines issued by the Commission establishing Guidelines” requirements for Interconnection between Operators as stated in Condition 15.

Prohibition of Undue Preference and Undue Discrimination

4.1 The Licensee shall not (whether in respect of charges, application of discount schemes, or other terms or conditions applied or otherwise) show undue preference to or exercise undue discrimination against any particular person or persons of any class or description in respect of:

a) the provision of a service under this Licence; or

b) the connection of any equipment approved by the Commission.

4.2 The Licensee shall be deemed to have shown such undue preference or to have exercised such discrimination if inter alia it unfairly favours to a material extent a business carried on by it or by its lawful telecommunications associates in relation to any of the matters mentioned in Condition 4.1 so as to place at a significant competitive disadvantage persons competing with that business.

4.3 Notwithstanding the provisions of Condition 4.1 the Licensee may provide the Service to a Customer on charges, terms and conditions that are preferential if the charge in question is in accordance with a tariff plan and terms and conditions that have been duly lodged with the Commission as required hereunder.

4.4 The sharing of infrastructure and facilities with other similarly Licensed persons and the terms and conditions thereof shall be subject to the prior approval of the Commission.

4.5 Any question relating to whether any act done or course of conduct pursued by the Licensee amounts to such undue preference or such undue discrimination shall be determined by the Commission, but nothing done in any manner by the Licensee shall be regarded as undue preference or undue discrimination if and to the extent that the Licensee is required to do that thing in that manner by or under any provision of this Licence.

Section 5 covers Prohibition of Cross-Subsidies and Section 6 covers Prohibition of anti-competitive conduct. Section 9 covers Separate Accounts for all Activities and Section 15 covers Interconnection Agreements. Section 27 covers Location of Points of Presence and specifies that their location and the routing to them cannot be changed without informing the Commission.

13.8 National Long Distance Licence

[NLDO/001/02] Granted by Nigerian Communications Commission XYZ Communications Limited Under Section 12 of Act No. 75 of 1992

Example of a National Long Distance Operator licence. This was the licence granted to Suburban Telecom to allow it to connect to Benin Telecom in neighbouring Benin.

“Long Distance Traffic” Traffic carried from one switching exchange to another, which are not located in the same city.

Section 4 covers Prohibition on Undue Preference and Undue Discrimination.

Section 5 covers Prohibition of Cross-Subsidies

Section 6 covers Prohibition of anti-competitive conduct

Section 15 covers Interconnection Agreements

Section 29 covers Locations of Points of Presence

14. Senegal

14.1 Loi n° 94-63 du 22 août 1994 sur les prix, la concurrence et le contentieux économique

TITRE PREMIER: DE LA CONCURRENCE

Art: 2 – Les prix des biens, produits et services sont librement déterminés par le jeu de la concurrence.

Chapitre premier- De la commission de la concurrence.

Art. 3 – Il est crée une commission de la concurrence comprenant six membres nommés pour une durée de cinq ans par décret.

La commission de la concurrence se compose de:

1. Deux membres ou anciens membres, de la cour de Cassation ou de la Cour d'Appel;

2. Deux personnalités exerçant ou ayant exercé lors des activités dans les secteurs de la production, de la distribution, de l'artisanat des services ou des professions libérales.

3. Deux personnalités choisies en raison de leur compétence en matière économique ou en matière de concurrence et de consommation. Trois suppléants sont choisis dans les mêmes conditions et les mêmes proportions.

Un commissaire du Gouvernement nommé par le Ministre chargé du Commerce parmi les fonctionnaires de la hiérarchie A de son département représente l'Administration.

Le mandat des membres de la commission de la concurrence est renouvelable.

Paragraphe 2. – Des pratiques anticoncurrentielles individuelles

Art. 26 – Il est interdit à tout producteur, commerçant, industriel, isolé ou en groupe:

- de refuser de satisfaire aux demandes des acheteurs de produits ou aux demandes de prestations de services, lorsque ces demandes ne présentent aucun caractère anormal, qu'elles émanent des demandeurs présentant la garantie technique, commerciale nécessaire ou de solvabilité nécessaire et que la vente de produits ou la prestation de services n'est pas interdite par les lois et règlements en vigueur.

Le refus de vente peut être constaté par tout moyen et notamment par une mise en demeure sous forme de lettre recommandée ou par procès-verbal dressé par tout agent habilité requis à cet effet.

Le retrait de la plainte par la partie lésée ne peut, en aucun cas, faire obstacle à la poursuite de la procédure par l'Administration.

Art. 27 – Est prohibée dans les mêmes conditions l'exploitation abusive par une entreprise ou un groupe d'entreprises:

1 d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci;

2 de l'état de dépendance économique dans lequel se trouve, à son égard, une entreprise cliente ou fournisseur qui ne dispose pas de solution équivalente.

Document provides a detailed description of the Competition Commission.

14.2 Loi n° 2001-15 du 27 decembre 2001 portant Code des Télécommunications

Expose des motifs

…la libéralisation à court terme et l'access à l'international en 2004;

Principes :

- la transparence
- la concurrence saine et loyale
- …
- l'interconnexion equitable des reseaux.

Chapitre 2: Definitions et principes

Section 1: Definitions

35) Interconnexion: les prestations reciproques offertes par deux exploitantes de reseaux ouvertes au public a un prestataire de service telephonique au public, qui permettent a l'ensemble des ultilisateurs de communiquer librement entre eux, quels qui soient les reseaux auxquels ils sont raccordes ou les services qu'ils utilisent.

37) Position dominant: Est presume exercer une telle influence tout operateur qui detient une part superieure a 25% du marche du telecommunications. Il peut entre tenu compte egalement du chiffre d'affaires de l'operateur par rapport a la taille du marche, de son control des moyens d'access d'utilisateur final , de son access aux resources financieres et de son experience dans la fourniture de produits et de services de telecommunications.

Article 5 contains a whole series of clauses about anti-competitive advantages inherited from the point before competition started, including "l'abus de position dominante."

Article 12 covers co-location"…de la disponsibilite de l'espace necessaire et de la prise en charge d'une part raisonnable des frais d'occupation des lieux.

Article 13 – Interconnexion by freely negotiated contract: dans des conditions reglementaire techniques et financieres, objectives et non-discriminatoires qui assurent des conditions de concurrence loyale."

Article 23: Lists "Les droits et obligations en matiere d'interconnexion."

14.3 Loi modifiant la Loi n° 2001-15 du 27 décembre 2001 portant Code des Télécommunications

Modifications to go from regulator being called ART (only resp for telecoms) to ARTP (responsible in addition for postal services)

14.4 Document de politique sectorielle des télécommunications

Repeats much of the policy document above

14.5 Loi n°2002-23 du 4 septembre 2002 portant cadre de régulation pour les entreprises concessionaires de services publics

CHAPITRE IV – PROTECTION DE LA CONCURRENCE

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Article 21: Pratiques anticoncurrentielles

En dehors des exclusivités transitoires à des entreprises par les textes réglementaires en vigueur, les pratiques anti-concurrentielles sont celles qui ont pour objet ou qui peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur le marché notamment lorsqu'elles tendent à:

- limiter l'accès au marché ou libre exercice de la concurrence par d'autres entreprises;
- faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leu hausse ou leur baisse par des pratiques de dumping ou de subventions croisées anticoncurrentielles. Les subventions croisées sont considérées anticoncurrentielles lorsqu'elles consistent à subventionner des services ouverts à la concurrence grâce à des ressources financières provenant des services sous exclusivité;
- limiter ou contrôler la production, les investissements ou le progrès technique;
- répartir les marchés et les sources d'approvisionnement;
- refuser de mettre à la disposition des autres entreprises, en temps opportun, les renseignements techniques sur les installations essentielles et les informations commercialement pertinentes, nécessaires à l'exercice de leur activité.

Article 22: Abus de position dominante

Constitue un abus de position dominante l'utilisation abusive par une entreprise ou un groupe d'entreprises:

- d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci;
- de l'état de dépendance dans lequel se trouve à son égard un client ou un fournisseur qui ne dispose pas de solutions de substitution équivalentes.

Ces abus peuvent notamment consister en des refus ou autorisations injustifiés ou discriminatoires d'accès aux réseaux ou services ouverts au public ou de fourniture de services ainsi que des ruptures injustifiées ou discriminatoires de relations commerciales établies.

La notion de position dominante est appréciée en fonction de l'influence significative de l'opérateur sur le marché. Il peut être tenu compte, notamment, du chiffre d'affaires de l'opérateur par rapport à la taille du marché, de son contrôle des moyens d'accès à l'utilisateur final, de son accès aux resources financières et des pratiques entravant le libre de exercice de la concurrence.

14.6 Tableaux comparatif sur l'interconnexion

A table comparing Senegalese legislation and regulation on interconnexion with the ECOWAS Supplementary Acts with recommendations for changes.

15. Sierra Leone

15.1 Telecoms Act 2006

INTERCONNECTION

The Telecoms Act mandates telecoms operators to submit copies of their interconnection agreements together with a summary of its principal terms to the Commission who should publish it by government notice. In this regard the Commission during the period under review contacted all GSM operators in the

country to submit their interconnection agreements pursuant to the Act with positive response from all existing active telecoms operators. With regards to interconnection, collocation and infrastructure sharing, the Commission held two interactive sessions with Operators and Service Providers in the industry which has yielded some progress on those issue and several others bordering on compliance with the provisions of the Act and the extant licence agreement entered into with new entrants in the industry and which the Commission will soon impress on existing operators through a negotiated settlement. The Commission succeeded in convincing Operators to reduce their interconnection rates from 13 US cents to 10 US cents in 2009 and negotiations are ongoing for future reductions to that rate.

THE INTERNATIONAL GATEWAY

The nation's only international gateway is by virtue of the provisions of the Act owned and operated by the incumbent operator – the Sierra Leone Telecommunications Company Ltd (SierraTel) for a period of two years after the commencement of the Act on the 3rd August 2006, after which the Commission is tasked with the responsibility of renewing that privilege. The Act also empowers the chairperson to review the incumbent operator's continued ownership and operation of the only installation after the expiration of the period. In this regard therefore both the Chairperson and the Commission are tasked with both reviewing the continued ownership and operation of the gateway and to renew their continued operation respectively. The Commission is fully apprised of its legal obligation under the Act to review and where possible renew the tenure of the incumbent operator's ownership and operation of the sole international gateway. The Commission continues to encourage comments and suggestions from stakeholders on this issue so as to enable it make an informed decision in any future review and/or renewal of the incumbent's continued sole ownership and control of the gateway.

15.2 Amended Acts 2009

Covers international roaming.

16. Togo

16.1 Loi n°98-005 du 11 février 98 sur les télécommunications

Main legislation

Definitions

7) " Interconnexion "

a) les prestations réciproques offertes par deux exploitants de réseaux ouverts au public permettant à l'ensemble de leurs utilisateurs de communiquer librement entre eux, quel que soit le réseau auquel ils sont raccordés;

b) les prestations d'accès au réseau ouvert au public offertes dans le même cadre par son exploitant à un prestataire de service de télécommunications;

Section IV. Interconnexion

Article 14: Interconnexion de réseaux

1. Les opérateurs de réseaux ouverts au public font droit, dans des conditions objectives, transparentes et non discriminatoires, aux demandes d'interconnexion des titulaires d'une autorisation délivrée en application de l'article 5 de la présente loi ainsi que des fournisseurs de services de télécommunications.

2. La demande d'interconnexion ne peut être refusée si elle est raisonnable au regard des besoins du demandeur d'une part, et des capacités de l'opérateur à la satisfaire d'autre part. Le refus d'interconnexion est motivé.

3. Un décret détermine les conditions générales d'interconnexion, notamment celles liées aux exigences essentielles, et les principes de tarification auxquels les accords d'interconnexion doivent satisfaire.

4. Les exploitants de réseaux ouverts au public visés à l'article 5 ci-dessus sont tenus de publier, dans les conditions déterminées par leur cahier des charges, une offre technique et tarifaire d'interconnexion approuvée préalablement par l'Autorité de réglementation.

5. Les tarifs d'interconnexion rémunèrent l'usage effectif du réseau de transport et de desserte, et reflètent les coûts correspondants.

Article 15: Nature des conventions d'interconnexion

L'interconnexion fait l'objet d'une convention de droit privé entre les deux parties concernées. Cette convention détermine, dans le respect des dispositions de la présente loi et des mesures prises pour son application, les conditions techniques et financières de l'interconnexion. Elle est communiquée, dès sa signature, à l'Autorité de réglementation qui l'examine et l'inscrit dans le registre des télécommunications.

Article 16: Modification des conventions d'interconnexion

Pour garantir l'égalité des conditions de concurrence ou l'inter-opérabilité des réseaux ou services de télécommunications, l'Autorité de réglementation peut, après avoir invité les parties à présenter leurs observations, leur demander de modifier leur convention d'interconnexion dans un délai déterminé. A l'expiration de ce délai, la convention d'interconnexion est réputée contenir les modifications demandées par l'Autorité de réglementation. Celle-ci peut procéder à des contrôles de vérification. L'Autorité de réglementation dispose d'un délai de six (6) mois à compter de la réception des conventions d'interconnexion pour demander leur modification. A l'expiration de ce délai, aucune modification ne peut être exigée.

Article 34 covers anti-competitive practices

Article 35 covers abuse of dominant position

16.2 Décret N° 2006-041/PR fixant les taux, les modalités d'affectation et de recouvrement des redevances dues par les opérateurs, exploitants et prestataires de services de télécommunications

Pour les exploitants de réseaux indépendants, le montant de la redevance d'autorisation est fixé comme suit:

- VSAT, USAT: 5 000 000 Fcfa;

Annex 5

Comparator documents

17. Kenya

17.1 Kenya Information and Communications (Fair Competition and Equality of Treatment) 2010

Dominant market power

8.(1) The Commission may on its own motion or on the application of an interested person, prepare a dominant market power report to determine whether a license dominant in a service or geographic communications markets.

Dominant operator interconnection obligations

(2) The Commission may, among other factors, use the criteria in regulation 7(2) when assessing or designating a communications market.

(3) The Commission shall, where it determines that a licensee has the ability to materially raise prices in such market without suffering a commensurate loss in service demand to other licensees or the ability to erect, or to benefit from, barriers to market entry that will materially affect the decision of other operators to enter such market, in its dominant power report determine that a licensee is dominant in a specific communications market.

(4) Subject to any other determination of the Commission, or to the demonstration by a licensee in the specific circumstances that the determination as dominant should not apply, the Commission may presume that a licensee is a dominant service provider in a communications market where the licensee's gross revenues exceeds twenty five per cent of the total revenues of all licensees in the relevant market.

(5) The Commission may direct dominant service provider to cease a conduct in that market which has or may have the effect of substantially reducing competition in any communications market or to implement appropriate remedies.

9. (1) Where the Commission has declared a licensee to be a dominant telecommunications service provider, the licensee shall-

(a) meet all reasonable requests for access to its public telecommunications network, in particular access at any technically feasible point on its telecommunications network;

(b) adhere to the principle of non-discrimination with regard to interconnection offered to other interconnecting licensees, particularly-

(i) apply similar conditions in similar circumstances to interconnecting licensees providing similar services and

(ii) provide interconnection facilities and information to other telecommunications licensees under the same conditions and of the same quality as it provides for its own services or those of its affiliates or subsidiaries;

(c) make available, on request, to other interconnecting licensees considering interconnection with its public telecommunications network, all information and specifications reasonably necessary, in order to facilitate conclusion of an agreement for interconnection, including information on changes planned for implementation within the next six months, unless provided otherwise by the Commission;

(d) submit to the Commission for approval and publish a Reference Interconnection Offer, sufficiently unbundled, giving the description of the interconnection offerings broken down into components according to the market needs and the associated terms and conditions including tariffs; and

(e) provide access to the technical standards and specifications of its telecommunications network with which another interconnecting licensee shall be interconnected.

(2) Where a dominant telecommunications service provider abuses its position when negotiating interconnection agreements, the Commission shall-

(a) require the dominant telecommunications service provider to desist, change its conduct or adopt a particular conduct; or

(b) declare the interconnection agreement wholly or partially invalid.

(3) The Commission shall, before taking the action in paragraph (2) (b) of this Regulation, request the dominant telecommunications service provider to refrain from the conduct that is inconsistent with these regulations.

(6) A dominant service provider shall-

(a) notify the Commission in writing of any proposal to change interconnection charges in the form and manner as prescribed by the Commission from time to time;

(b) sufficiently unbundle charges for interconnection, so that the telecommunications licensee requesting the interconnection is not required to pay for any item that is not related to the service requested;

(c) maintain a cost accounting system that-

(i) complies with the cost accounting guidelines that may be published by the Commission from time to time;

(ii) demonstrates that its charges for interconnection have been fairly and properly calculated;

(d) avail to the Commission, on request, a description of its cost accounting system showing the main categories under which costs are grouped and the guidelines for allocation of costs to interconnection and the Commission's, or any other competent body; regulations or guidelines have been adhered to.

(7) A dominant telecommunications service provider shall promptly, on request supply financial information to the Commission to the level of detail specified by the Commission.

(8) The Commission shall upon satisfying that the dominant telecommunications service provider has fully complied with these regulations together with any other guidelines that it may have prescribed, publish a compliance report.

(9) In addition, the Commission while taking account of considerations of commercial confidentiality, may publish such financial information in order to contribute to an open and competitive telecommunications market.

Separate accounts

10. (1) A licensee shall maintain separate books of account for each service as may be prescribed by the Commission from time to time and shall not cross-subsidize the prices for any service it offers in the market with revenue from the sale of communication systems and services.

(2) A licensee shall maintain accounting separation techniques to be focused on the separation of revenues, costs and capital employed into categories in order to ensure that there is no discrimination between internal and external pricing in all services provided by the licensee.

(3) Where the interconnection services are not provided through a structurally separated subsidiary, a dominant telecommunications service provider shall keep separate accounts as if the telecommunications activities in question were in fact carried out by legally independent companies, to identify all elements of cost and revenue together with the basis of their calculation and the detailed attribution methods used.

(4) A dominant telecommunications service provider shall maintain separate accounts in respect of interconnection services and its core telecommunications services and the accounts shall be submitted for independent audit and thereafter published.

(5) The Commission shall from time to time develope guidelines providing for the system of transfer charges to be applied to services and products provided from one licensee to another and for the implementation of this regulation.

Obligations

11. (1) All licensees shall provide uniform, non-preferential service on a first-come – first-served basis to all persons within a covered geographical area or a given class who request for such service.

(2) A licensee shall not violate the principle of equal access and non preferential treatment if it-

(a) considers the ability of a person to pay for a service when deciding whether to provide a service to the person; or,

(b) makes other rational classifications among subscribers, such as business and residential, and to provide service on the basis of the classification.

17.2 Kenya Information and Communications (Interconnection and Provision of Fixed Links, Access and Facilitation) Regulations 2010

Rights and Obligations to Interconnect

4. (1) An interconnecting licensee shall, subject to compliance with the provisions of the Act and any guidelines on interconnection of telecommunications systems and services that the Commission may from time to time publish, have the right to choose its interconnection licensee to route its data traffic and calls towards customers of another licensee.

(2) Notwithstanding paragraph (1), an interconnecting licensee shall route its data traffic and calls towards international destinations through a licensee who has been licensed to provide the service.

(3) An interconnection licensee shall have the right and, when requested by an interconnecting licensee, an obligation, to negotiate the interconnection of its telecommunications system, facilities and equipment with the telecommunications system, facilities and equipment of the interconnecting licensee, in order to provide end-to-end connectivity and interoperability of services to all customers.

(4) A interconnection licensee shall accept all reasonable requests for access to its telecommunications system at the network termination points offered to the majority of the interconnecting operators.

(5) The Commission may exempt an interconnection licensee from the obligation under paragraph (1), where-

(a) an interconnection agreement is prohibited by law;

(b) the licence issued to a licensee does not permit a licensee to offer the services for which the interconnection is requested;

(c) the requested interconnection is rendered impossible as a result of technical specifications; or

(d) the interconnection would endanger the life or safety or result in injury of any person or harm to the interconnect licensee's property or hinder the quality of the services provided by the licensed service provider.

(6) The Commission shall publish any exemption granted under paragraph (5) of this Regulation.

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(d) the interconnection would endanger the life or safety or result in injury of any person or harm to the interconnect licensee's property or hinder the quality of the services provided by the licensed service provider.

(6) The Commission shall publish any exemption granted under paragraph (5) of this Regulation.

Negotiation of interconnection agreements.

5. (1) An interconnect licensee shall provide interconnection information to an interconnecting licensee upon receipt of written request.

(2) An interconnecting licensee's request for interconnection shall be given reasonable priority over customer orders of the interconnect licensee.

(3) Parties to an interconnection agreement shall negotiate in good faith and reasonably endeavour to resolve disputes relating to the form and subject of an interconnection agreement that may arise.

(4) Parties to an interconnection agreement shall negotiate freely between themselves and each negotiating party shall not-

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(a) intentionally mislead the other party;

(b) coerce the other party into making an agreement that it would not otherwise have made; or

(c) intentionally delay or obstruct negotiations.

(5) The terms and conditions for interconnection of telecommunications networks shall be based on the agreement reached between the parties to an interconnection agreement and promote increased access and efficient use of telecommunications systems, services and facilities.

(6) All interconnection agreements shall facilitate end-to-end connectivity by ensuring that calls originated on the telecommunications system of an interconnecting operator can be terminated at any point on the telecommunications system of any other telecommunications service provider on a non-discriminatory basis.

(7) The telecommunication system licensees shall make all interconnection agreements between them in writing and specify-

(a) the scope and specification of interconnection;

(b) access to all ancillary or supplementary services or access to and use of premises or land necessary to support interconnection;

(c) maintenance of end-to-end quality service and other service levels;

(d) charges for interconnection;

(e) billing and settlement procedures;

(f) ordering, forecasting, provisioning and testing procedures;

(g) points of interconnection or co-location;

(h) the amount of, or the forecast procedures to be used to determine, interconnect capacity to be provided;

(i) transmission of call line identity;

(j) network information;

(k) information regarding system modernization or rationalization;

(l) technical specifications and standards;

(m) interoperability testing, traffic management, measurement and system maintenance;

(n) an information handling process and confidentiality agreement;

(o) duration for and renegotiation of the agreement;

(p) formation of appropriate working groups to discuss matters relating to interconnection and to resolve any disputes;

(q) formal dispute resolution procedures;

(r) definition and limitation of liability and indemnity;

(s) adequate capacity, service levels and reasonable remedies for any failure to meet those service levels;

(t) force majeure;

(u) other contractual terms and conditions; and

(u) any other matters that the Commission mayprescribe.

8) Interconnection agreements shall not, directly or indirectly –

(a) preclude or frustrate the exercise of rights or privileges given under the Act or a licence or by any person;

(b) impose any penalty, obligation or disadvantage on any person for exercising any rights under the Act or a licence;

(c) prohibit a person from providing an interconnection service which that person is able to lawfully provide; or

(d) frustrate the provision of a telecommunications service by a person is able to lawfully provide.

(8) The Commission may on its own initiative or upon the request of a party-

(a) intervene in negotiations on agreements for interconnection where no agreement is reached between the negotiating parties within six weeks of the commencement of the negotiations; or

(b) set time limits within which negotiations on interconnection are to be completed, which time limits shall not exceed six weeks unless the Commission considers that a longer period is necessary.

(10) The Commission may from time to time issue technical, costing and other relevant guidelines to guide licensees in negotiating interconnection agreements.

(11) Where a telecommunications service licensee-

(a) enters into an interconnection agreement with another telecommunications licensee, the Commission may review the agreement to ensure that it conforms with the Act, Regulations and any guidelines on interconnection of telecommunications networks issued by the Commission; or

(b) has not interconnected its facilities upon request by another licensee, the Commission shall require the licensee concerned to interconnect its facilities in order to protect essential public interests and may set the terms and conditions of the interconnection.

and transparency. 9. In similar conditions and similar circumstances, an interconnection licensee shall provide interconnection on a non-discriminatory basis and the interconnection licensee shall ensure that-

(a) the rates it charges do not vary on the basis of the class of customers to be served;

(b) it provides interconnecting licensees with interconnection facilities and information under the same conditions and in the same quality that it affords to its subsidiaries, affiliates, or other similarly situated interconnecting licensees;

(c) it avails to interconnecting licensees all necessary information and specifications related to interconnection; and

(d) customers of an interconnecting licensees receive treatment that is no less favourable than the treatment which it affords to its own customers or the customers of its subsidiaries, affiliates, or other similarly situated interconnecting licensees.

Quality of service

10. (1) Parties to an interconnection agreement shall comply with all relevant service standards of the International Telecommunications Union and other technical standards that the Commission may publish from time to time.

(2) A licensee shall ensure that the prescribed quality of service is not impaired on interconnection.

Interconnection charging

12. (1) All charges for interconnection services shall-

(a) be objective, independently verifiable and fair;

(b) be charged for each type of telecommunications service related to interconnection;

(c) not be designed to facilitate cross-subsidies by an interconnect provider of its network;

(d) be below the retail charges levied by the interconnect provider for the provision of any retail service that makes similar use of those network elements that are required by both the retail and interconnection service; and

(e) be sufficiently below retail service charges to allow for recovery of the incremental retail costs associated with provision of the retail service supported by the interconnection service that the interconnect service provider would have to incur in order to compete effectively with the interconnect provider at the retail level.

(2) All charges for interconnection shall be structured to distinguish and separately price-

(a) fixed charges for the establishment and implementation of physical interconnection;

(b) periodic rental charges for use of facilities, equipment and resources including interconnect and switching capacity; and

(c) variable charges for telecommunications services and supplementary services.

(3) A licensee shall be free to acquire services from an interconnect provider at any retail price offered by the interconnect provider without prejudice to any rights to acquire the same or similar services under an interconnection agreement.

(4) The Commission shall prescribe guidelines interconnection charging methodology from time to time.

Points of connection

Location of points of interconnection.

14. (1) Parties to an interconnecting agreement shall establish and maintain points of interconnection at any technically feasible points agreed by the parties.

(2) An interconnecting licensee shall, in sufficient detail, notify the interconnection licensee of the points at which they wish to be interconnected to enable the interconnection licensee to assess the systems conditioning and other requirements for establishing such points of interconnection.

(3) Points of interconnection shall be established as soon as practicable following a request and not later than thirty days from the date of the request.

(4) Unless otherwise determined by the Commission, interconnecting licensees shall be responsible for the cost of building and maintaining the points, data fill and switching capacity to support the interconnection and for the costs of transport from their points of origination to points of interconnection.

(5) Licensees providing interconnection services may mutually agree on the point of interconnection and share the costs of establishing such points of interconnection.

(6) Where a licensee seeking interconnection from any interconnection licensee requests that its facilities for interconnection be co-located with the facilities or premises of the interconnection licensee, such co-location may be provided and the costs of such co-location shall be mutually agreed by the parties.

Collocation

19. (1) Where a licensee has the right to install facilities on, over or under private land or take advantage of a procedure for the expropriation or use of property, the Commission shall encourage the sharing of such facilities and property with other licensees, in particular, where other licensees do not have access to viable alternatives.

(2) A service provider providing such co-location shall-

(a) file with the Commission a schedule of fees charged for co-location;

(b) agree on a meet-point with another licensee seeking interconnection and designating location for interconnecting the network;

(c) provide reasonable, just, and non-discriminatory rates, terms and conditions for physical collocation of equipment necessary for interconnection or for providing access to the unbundled network elements at the licensee's premises;

(d) resort to virtual co-location, requiring interconnection at a place outside the licensee's usual premises such as switching, transmission, or main distribution door frame room if it is demonstrated that physical co-location is not practical for technical reasons or for space limitations;

(e) agree with a licensee seeking interconnection on a facility that is based in the central office of either party to complete the transmission; and

(f) charge a fee according to filed tariffs.

(3) The terms and conditions for co-location or sharing of facilities shall be subject to a commercial and technical agreement between the parties concerned and the Commission may intervene to resolve disputes arising from such agreements.

Network Access and Facilities

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ties in the following manner-

(a) access to network facilities shall be commercially agreed upon between the facilities acquirer and the facilities licensee;

(b) request for access to network facilities shall be reasonable and in writing;

(c) a facilities licensee and a facilities acquirer shall negotiate access to network facilities, at all times, in good faith;

(d) a facilities licensee shall submit a copy of a concluded access agreement to the Commission within thirty days after the conclusion;

(e) the Commission may authorize access to essential facilities of dominant telecommunications service providers; and

(f) a facilities licensee who has been authorized to provide access to network facilities shall be entitled to levy a charge for such access to enable it recover economic costs and ensure a reasonable rate of return;

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(2) A facilities provider shall treat each-

(a) facilities acquirer on a basis that is non-discriminatory in its provision of facilities and no less favourable than the treatment which the facilities provider affords to its subsidiaries, its affiliates, or other similarly situated facilities acquirers;

(c) communication network service of a facilities acquirer on a basis that is non-discriminatory and no less favourable than the treatment which the facilities provider affords to the electronic communication network services of itself, its affiliates, or other similarly situated facilities acquirers; and

(d) customer of a facilities acquirer on a basis that is non-discriminatory and not less favourable than the treatment which the facilities provider affords to its own customers of the customers of its subsidiaries, its affiliates, or other similarly situated facilities acquirers.

(3) A facilities licensee may refuse unreasonable requests for access to its network facilities.

(4) A request for access to network facilities shall be unreasonable if it-

(a) is not economically or technically feasible; or

(b) may result in the facilities licensee being unduly prejudiced.

(5) An access agreement shall be in writing and it shall, unless it is not relevant to the access that has been requested, specify-

(a) the scope and specification of the facilities to be provided;

(b) access to all ancillary or supplementary services, or access to and use of premises or land that are required to support the provision of network facilities;

(c) service levels and the maintenance of facilities;

(d) charges for the facilities;

(e) billing and settlement procedures;

(f) ordering, forecasting, provisioning and testing procedures;

(g) the provision of co-location for facilities and the terms and conditions in accordance with which co-location is to be provided;

(h) technical specifications, standards and inter-operability tests;

(i) information handling and confidentiality;

(j) duration, re-negotiation and review procedures; and

(k) dispute resolution procedures.

(6) A facilities licensee shall not be required to provide access where, in the Commission's view, it is not reasonable to require the facilities provider to provide access including, among others, to circumstances where it is beyond its control or it is not reasonably practicable.

Dispute Resolution

22. Any dispute arising out of the application of these Regulations shall be resolved in accordance with the Kenya Information and Communications (Dispute Resolution) Regulations, 2010.

18. Mauritius

18.1 Mauritius: ICT Act 2001

28. Interconnection agreements

(1) Every network licensee or public operator shall grant access to his network in accordance with this section.

(2) A licensee may make a written application to a network licensee for access to its network with a copy of the application to the Authority.

(3) (a) Where a network licensee receives an application he shall, unless the Authority otherwise determines, negotiate the terms of an interconnection agreement with the applicant in good faith.

(4) (a) Either party to the proposed agreement may request the Authority to depute a representative to attend, and assist in the negotiations. Subject to paragraph (b), the rates for interconnection shall be determined in accordance with any charging principles in force.

Where an interconnection agreement is negotiated before any charging principles have been prescribed, the agreement shall, where appropriate, be amended by the parties to comply with any charging principles that may subsequently be prescribed.

(5) Where the parties to a proposed interconnection agreement are unable to agree on the terms thereof within 60 days from the date of an application under subsection (2), either party may request the Authority to act as an arbitrator in the matter.

30. Competition

(1) A dominant operator shall not take advantage of his power in a market for the supply of an information and communication service, including a telecommunication service with a:view to –

(a) eliminating or substantially damaging another licensee in the market in which he operates or in any other market;

(b) preventing the entry of any other person into that market or any other market;

(c) deterring any other licensee from engaging in competitive conduct in that. or in any other market.

(2) (a) A dominant operator shall not discriminate between persons who acquire or make use of an information and communication service, including a telecommunication service, in the market in which he operates in relation to –

(i) any fee or charge for the service provided;

(ii) the performance characteristics of the service provided;

(iii) any other term or condition on which the service is provided.

19. NEPAD

19.1 Kigali Protocol

The Legal Basis for the Proposed Protocol

6. We identified two international agreements of potential application to the proposed protocol. These are the Constitutive Act of the African Union and the Treaty establishing the African Economic Community.

7. All countries in the proposed project are members of the African Union and almost all have ratified the Treaty establishing the African Economic Community.

10. We accordingly based the proposed protocol on the Constitutive Act of the African Union. Articles 4 of the Constitutive Act includes the promotion of self-reliance within the framework of the Union and the promotion of social justice to ensure balanced economic development as some of the Union's operational principles. Article 3, for its part, lists the objectives of the African Union as to accelerate the political and socio-economic integration of the continent as well to coordinate and harmonize policies between existing and future Regional Economic Communities. Combined, these two articles give the legal basis for the protocol as proposed.

Article 2

Objectives

1. The objectives of this Protocol are:

a. To promote and facilitate the provision of broadband ICT infrastructure to support high-quality, high-speed and reliable electronic communications in Eastern and Southern Africa and with the rest of the world at Affordable Price for End Users based on Open Access Principles;

b. To secure the rollout of broadband open access infrastructure in the Region as provided for in this Protocol with the involvement of the private sector.

Article 3

General Undertakings

2. The High Contracting Parties shall refrain from any unilateral and or collective action that may hinder the attainment of the objectives of this Protocol.

3. Each High Contracting Party undertakes, in accordance with its own laws, to ensure that the establishment, ownership, funding, management and general operation of the Operating Entity/Entities is in accordance with the provisions of this Protocol.

4. The Parties undertake to take the necessary steps to harmonise their legal, policy and regulatory frameworks for purposes of achieving the objectives of this Protocol.

Article 15

Principles for Determination of Wholesale Charges

1. Access charges, interconnection charges, usage charges and any other wholesale tariffs and or charges that the Operating Entity/Entities may levy shall be established in accordance with Article 11 of this Protocol, and in addition be in conformity with the following:

a. Tariffs and charges for all wholesale bandwidth and switched services in the reference offer shall, in all applicable cases, be independent of distance and be based on capacity provided in order to ensure equitable access to all participating countries and Service Providers in the region.

b. Tariffs and charges shall be uniform, and be denominated in one international currency. The only factor that may influence price variations in local currency for Services offered by the Operating Entity/Entities shall be the exchange rate fluctuations in the territory of a participating party.

c. There shall be no internal settlement or transit charges for regional cross-border traffic, as long as the traffic is carried over the Operating Entity/Entities.

Article 16

Access to Undersea and Terrestrial Broadband Fibre Optic Cable Systems

A Access to International Undersea Fibre Optic Cable Systems

1. The High Contracting Parties, recognizing the exceptional position of countries with existing or planned international fibre optic cable systems and the special needs of Land Locked States, agree that countries that have landing points for existing, planned or future international and regional fibre optic cable systems shall issue a licence(s) to and / or authorise the Operating Entity/Entities in their countries in

accordance with the provisions of this Protocol to ensure that the Operating Entity/Entities has direct access to such cables.

2. The terms and conditions, including charges, for access to landing points imposed on the Operating Entity/Entities shall, where the fibre optic cable is part of the NEPAD Broadband ICT Infrastructure be set in terms of the provisions of this Protocol.

3. In the event landing points are not part of the Regional Network, the coastal High Contracting Parties undertake to use their best endeavour to ensure that the terms and conditions, including charges, imposed on the Operating Entity/Entities are affordable, transparent and fair.

4. The obligation created by this Article shall exist and be binding on all the High Contracting Parties notwithstanding the fact that neither a specific High Contracting State Party nor any operator from within its territory participate in the Operating Entity/Entities as an investor and or in any capacity, if they choose not to.

20. South Africa

20.1 South Africa: Electronic Communications Act 2005

Definitions

'essential facility'' means an electronic communications facility or combination of electronic communications or other facilities that is exclusively or predominantly provided by a single or limited number of licensees and cannot feasibly (whether economically, environmentally or technically) be substituted or duplicated in order to provide a service in terms of this Act;

Item 8, Terms and Conditions for Licences

(e) the public interest in ensuring service interoperability, non-discrimination and open access, interconnection and facilities leasing;

m) the public interest in facilitating and maintaining a competitive electronic communications environment and in regulating and controlling anti-competitive practices;

Chapter 7 Interconnection

Obligation to interconnect

37. (1) Subject to section 38, any person licensed in terms of Chapter 3 must, on request, interconnect to any other person licensed in terms of this Act and persons providing service pursuant to a licence exemption in accordance with the terms and conditions of an interconnection agreement entered into between the parties, unless such request is unreasonable. 5

(3) For the purposes of subsection (1) a request is reasonable where the Authority determines that the requested interconnection—

(a) is technically and financially feasible; and

(b) will promote the efficient use of electronic communications networks and services.

38.

3) The interconnection regulations and interconnection agreement principles may include, but are not limited to matters relating to—

(a) the time frame and procedure for—

(i) the negotiation of interconnection agreements;

(ii) the conclusion of an interconnection agreement; and

(iii) the technical implementation of the interconnection agreement;

(b) the quality, performance and level of service to be provided;

(c) subject to and in accordance with section 41, interconnection pricing principles;

(d) the provision of electronic communications facilities to establish points of interconnection;

(e) the sharing of technical information, including obligations imposed in respect of the disclosure of current and future electronic communications network planning activities;

(f) contractual dispute-resolution procedures;

(g) billing and settlement procedures;

(h) interconnection services such as support systems, calling line identification, signalling services, supervision, functionality, unbundling of interconnection services, fault reporting, co-operation in the event of faults and collocation;

(i) access and security arrangements;

(j) the framework for determining technical and financial feasibility and promotion of efficient use of the electronic communications networks and provision of services contemplated in section 37(3);

(k) the requirement that a licensee negotiate and enter into an interconnection agreement with an applicant for an individual licence; and

(l) the manner in which interconnection services are to be unbundled and made separately available by licensees.

39. (1) An interconnection agreement must be in writing and must be submitted to the Authority.

Interconnection pricing principles

41. The Authority may prescribe regulations establishing a framework of wholesale interconnection rates to be charged for interconnection services or for specified types of interconnection and associated interconnection services taking into account the provisions of Chapter 10.

CHAPTER 8

ELECTRONIC COMMUNICATIONS FACILITIES LEASING

Obligation to lease electronic communications facilities

43. (1) Subject to section 44(5) and (6), an electronic communications network service licensee must, on request, lease electronic communications facilities to any other person licensed in terms of this Act and persons providing services pursuant to a licence exemption in accordance with the terms and conditions of an electronic communications facilities leasing agreement entered into between the parties, unless such request is unreasonable.

(2) Where the reasonableness of any request to lease electronic communications facilities is disputed, the party requesting to lease such electronic communications facilities may notify the Authority in accordance with the regulations prescribed in terms of section 44.

(10) An electronic communications network service licensee may not enter into any agreement or other arrangement with any person for access to, or use of, any international electronic communications facilities, including submarine cables and satellites, that—

(a) contains an exclusivity provision;

(b) contains provisions that create undue barriers to access to and use of such international communication facilities; or

(c) otherwise restricts any party to such agreement or other arrangement from—

(i) leasing;

(ii) selling; or

(iii) otherwise entering into an agreement with any licensee under this Act or person providing services pursuant to a licence exemption for access to, and use of, such international electronic communications facilities.

(11) Any exclusivity provision contained in any agreement or other arrangement that is prohibited under subsection (10) is invalid from a date to be determined by the Minister after consultation with relevant parties.

Electronic communications facilities leasing regulations

44. (1) The Authority must prescribe regulations to facilitate the conclusion of electronic communications facilities leasing agreements by stipulating electronic communications facilities leasing agreement principles and such regulations may include the regulations referred to in section 47.

(2) Electronic communications facilities leasing regulations and electronic communications facilities leasing agreement principles must provide for a framework which may include a reference electronic communications facilities leasing offer containing model terms and conditions for electronic communications facilities listed in section

43(8).

(3) Matters which the electronic communications facilities leasing regulations may address include but are not limited to—

(a) the time frame and procedures for—

(i) the negotiation of electronic communications facilities leasing agreements;

(ii) the conclusion of electronic communications facilities leasing agreements; and

(iii) the technical implementation of the electronic communications facilities leasing agreements;

(b) the quality, performance and level of service to be provided, including time to repair or restore, performance, latency and availability;

(c) subject to and in accordance with section 47, wholesale electronic communications facilities leasing rates and the manner in which the structure of fees and charges for such electronic communications facilities leasing must be determined;

(d) the sharing of technical information including obligations imposed in respect of the disclosure of current and future electronic communications network planning activities;

(e) contractual dispute resolution procedures;

(f) billing and settlement procedures;

(g) the list of electronic communications facilities contemplated in section 43(8) as reviewed and modified as contemplated in section 43(9);

(h) services associated with leasing electronic communications facilities such as support systems, collocation, fault reporting, supervision, functionality, unbundling, and co-operation in the event of fault;

(i) access and security arrangements;

(j) the framework in accordance with which an electronic communications network service licensee may refuse a request to lease electronic communications facilities due to such electronic communications network service licensees' planned expansion of its electronic communications network;

(k) the framework for determining technical and financial feasibility and promotion of efficient use of electronic communications networks and provision of services contemplated in section 43(4);

(l) the requirement that an electronic communications network service licensee negotiate and enter into an electronic communications facilities leasing agreement with an applicant for an individual licence; and

(m) the manner in which unbundled electronic communications facilities are to be made available.

Filing of electronic communications facilities leasing agreements

45. (1) An electronic communications facilities leasing agreement must be in writing and must be submitted to the Authority.

(2) Electronic communications facilities leasing agreements are effective and enforceable upon being filed with the Authority in the prescribed manner unless an order of a court of competent jurisdiction is granted against such agreement or the Authority provides the parties with written notice of non-compliance in terms of subsection (6).

(3) The Authority must publish electronic communications facilities leasing agreements submitted in terms of subsection (1). 30

COMPETITION MATTERS

67. (1) Where the Authority determines that the holder of a licence under this Act or a person providing a service pursuant to a licence exemption has engaged in an act or intends to engage in any act that is likely to substantially prevent or lessen competition by, among other things,—

(a) giving an undue preference to; or

(b) causing undue discrimination against, any other licensee or person providing a service pursuant to a licence exemption, the Authority may direct the licensee, by written notice, to cease or refrain from engaging in such act.

(a) define and identify the retail or wholesale markets or market segments in which it intends to impose pro-competitive measures in cases where such markets are found to have ineffective competition;

(b) set out the methodology to be used to determine the effectiveness of competition in such markets or market segments, taking into account subsection (8);

(c) set out the pro-competitive measures the Authority may impose in order to remedy the perceived market failure in the markets or market segments found to have ineffective competition taking into account subsection (7);

(d) declare licensees in the relevant market or market segments, as applicable, that have significant market power, as determined in accordance with subsection (6), and the pro-competitive conditions applicable to each such licensee;

(e) set out a schedule in terms of which the Authority will undertake periodic review of the markets and market segments, taking into account subsection (9) and the determination in respect of the effectiveness of competition and application of pro-competitive measures in those markets; and

(f) provide for monitoring and investigation of anti-competitive behaviour in the relevant market and market segments.

(5) A licensee has significant market power with regard to the relevant market or market segment where the Authority finds that the particular individual licensee or class licensee—

(a) is dominant;

(b) has control of essential facilities; or

(c) has a vertical relationship that the Authority determines could harm competition in the market or market segments applicable to the particular category of licence.

(6) The methodology contemplated in subsection (4)(b) must include but is not limited to an assessment of the following:

(a) When defining the relevant market or market segments the Authority must consider the non-transitory (structural, legal, or regulatory) entry barriers to the applicable markets or market segments and the dynamic character and functioning of the subject markets or market segments;

(b) When conducting an analysis of the effectiveness of competition in the relevant markets or market segments the Authority must take the following factors, among others, into account:

(i) An assessment of relative market share of the various licensees in the defined markets or market segments; and

(ii) A forward looking assessment of the market power of each of the market participants over a reasonable period in terms of, amongst others:

(aa) actual and potential existence of competitors;

(bb) the level, trends of concentration, and history of collusion, in the market;

(cc) the overall size of each of the market participants;

(dd) control of essential facilities;

(ee) technological advantages or superiority of a given market participant;

(ff) the degree of countervailing power in the market;

(gg) easy or privileged access to capital markets and financial resources;

(hh) the dynamic characteristics of the market, including growth, innovation, and products and services diversification;

(ii) economies of scale and scope;

(jj) the nature and extent of vertical integration;

(kk) the ease of entry into the market, including market and regulatory barriers to entry.

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